

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED AUG 31 1944

IN THE

United States Court of Appeals

CLERK

DISTRICT OF COLUMBIA

—
No. 8781
—

222

JAMES H. BLAKE, *Appellant*,

v.

EDWARD P. TRAINER, *Appellee*.

—
**Appeal from Judgment of the District Court of the United
States for the District of Columbia.**
—

L. HAROLD SOTHORON,
P. MICHAEL COOK,
815 Fifteenth Street, N. W.,
Attorneys for Appellant.

INDEX TO BRIEF.

	Page
Jurisdictional Statement	1
Statement of the Case	2
Statement of Points	5
Summary of Argument	5
Argument	5
I. Motion for Directed Verdict at Conclusion of Plaintiff's Case Should Have Been Granted	5
(a) Alleged Libelous Communication Not De- famatory	5
(b) Letter Not Libelous Per Se and No Special Damages Either Alleged or Proven	10
(c) Alleged Libelous Communication Quali- fiedly Privileged	13
II. Court Should Have Instructed Jury Alleged Li- belous Communication Qualifiedly Privileged ..	23
Conclusion	28

TABLE OF CASES.

Ashford v. Evening Star Newspaper Co., 41 App. D. C. 395	15
Bailey v. Holland, 7 App. D. C. 184, 190	14
Baker v. Warner, 231 U. S. 588, 58 L. Ed. 384, 388	11
Bearce v. Bass, 88 Me. 521, 51 Am. St. Rep. 446, 34 Atl. 411	9
Belknap v. Ball, 83 Mich. 583, 21 Am. St. Rep. 622, 47 N. W. 674, 11 L. R. A. 72	9
Bereman v. Power Pub. Co. et al., 93 Colo. 581, 27 P. (2d) 749, 92 A. L. R. 1024, 1026	17, 20, 24
Brown v. Norfolk & Western R. Co., 100 Va. 619, 42 S. E. 664, 60 L. R. A. 472	25
Burton v. Crowell Pub. Co., (2 Cir.), 82 F. (2d) 154, 155	6

	Page
Caldwell v. Hayden, 42 App. D. C. 166, 169	6, 15, 16
Denver Pub. Warehouse Co. v. Holloway, 83 P. 131 (Colo.), 3 L. R. A. (N. S.) 696, 701	24
Emde et al. v. San Joaquin County Central Labor Council, 143 P. (2d) 20 (Calif.)	9, 24
Fitts v. Davis, 50 App. D. C. 234, 269 F. 1018.	16
Garcia v. Sociedad de Obreros, 263 S. W. 943	19
Globe Furn. Co. v. Wright, 49 App. D. C. 315, 265 F. 873	15
Hayden v. Hasbrouck, 84 Atl. 1087 (R. I.), 42 L. R. A. (N. S.) 1109, 1113	24
Henry v. Moberly, 23 Ind. App. 305 51 N. E. 497	24
Heralds of Liberty v. Rankin, 94 So. 849, 850, 130 Misc. 698	12
Jarvis v. Hathaway, 3 Johns. 180, 3 Am. Dec. 473	17
Kirkpatrick v. Eagle Lodge, 26 Kan. 384, 40 Am. Rep. 316	17, 18, 25
Koenig v. Ritchie, 3 F. & F. 413	23
Lattimore v. Tyler Commercial College, 24 S. W. (2d) 361	24
Louisiana Oil Corp. et al. v. Renno, 157 So. 705 (Miss.), 98 A. L. R. 1296, 1299	15
Mielly v. Soule et al., 21 So. 593, 49 La. Ann. 800	22
Natl. Disabled Soldier League v. Haan, 55 App. D. C. 243, 4 F. (2d) 436	15, 23, 26
Parker v. Appalachian Elec. Power Co., 30 S. E. (2d) 1 (Wa. Va)	22
Parker v. Kirkland, 298 Ill. App. 340, 18 N. E. (2d) 709	13
People's Life Ins. Co. of Wash., D. C., et al. v. Talley, 186 S. E. 42	21, 26
Pinn v. Lawson et al., 63 App. D. C. 370, 72 F. (2d) 742	18
Potts v. Dies, 77 U. S. App. D. C., 92, 132 F. (2d) 734 ..	8
Pritchard v. Wenger, 110 Atl. 726, 727, 268 Pa. 114 ..	19
Remington v. Congdon, 2 Pick. 310, 13 Am. Dec. 431. .	17, 24
Rodger v. American Kennel Club, Inc., 245 N. Y. S. 662, 138 Misc. 310	8
Shurtleff v. Stevens, 51 Vt. 501, 31 Am. Rep. 698	17
Snowden v. Lindo, 1 Cr. (1 D. C.) 561	8
Spencer v. Amerton, 1 Moo. & Rob. 470	16
Streety v. Wood, 15 Barb. 105	17
Sullivan v. Meyer, 67 App. D. C. 228, 91 F. (2d) 301 ..	11
Warner v. Baker, 36 App. D. C. 493	11

Index Continued.

iii

	Page
Washington Post Co. v. Chaloner, 250 U. S. 288, 63 L. Ed. 987	11
White v. Nicholls et al., 3 How. 266, 11 L. Ed. 591, 600, 8, 22, 23	
Whiteley v. Adams, 15 C. B. (N. S.) 392, 33 L. J. C. P. (N. S.) 89, 10 Jur. (N. S.) 470, 9 L. T. (N. S.) 483, 12 Week. Rep. 153	18
World Oil Co., Inc. v. Hicks, 46 S. W. (2d) 394 (Tex.), 19, 24	
York v. Pease, 2 Gray 282	17

AUTHORITIES.

American Jurisprudence, Vol. 33	6, 11
American Law Reports, Vol. 150, p. 932, note	13
Cooley, Torts	18
Odgers, Libel and Slander	16
Webster, Unabridged Dictionary	6

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA

No. 8781

JAMES H. BLAKE, *Appellant*,

v.

EDWARD P. TRAINER, *Appellee*.

Appeal from Judgment of the District Court of the United
States for the District of Columbia.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from the District Court of the United States for the District of Columbia to review its final judgment of February 18, 1944 for plaintiff (appellee) in an action for damages for libel. For convenience, appellant will be called defendant and appellee plaintiff throughout this brief.

This case was tried before the Court and a jury upon the complaint (App. 2), defendant's answer (App. 6) and evidence adduced at the trial, and resulted in a verdict and judgment in the amount of \$2,500 for plaintiff (App. 193).

The District Court had jurisdiction under Section 11-306 of the District of Columbia Code (1940).

This Court has jurisdiction to review said final judgment under the provisions of Section 17-101 of the District of Columbia Code (1940).

STATEMENT OF THE CASE.

Plaintiff is the secretary and business manager of Local No. 33, Marine Engineers Beneficial Association (App. 2). Defendant is Secretary-Treasurer of the National Marine Engineers Beneficial Association (App. 109), with whom No. 33 is affiliated as a subordinate union. This organization is a union of marine engineers affiliated with the Congress of Industrial Organizations (App. 110). It is the duty of the plaintiff as such secretary and business manager to negotiate contracts respecting wages and working conditions with steamship lines (App. 11). The defendant is the general executive officer of the National organization and is editor-in-chief of its official magazine, The American Marine Engineer (App. 203).

On June 29, 1943, the plaintiff wrote to S. J. Hogan, President of the National Marine Engineers Beneficial Association, stating that members of No. 33 were protesting against an advertisement that appeared in The American Marine Engineer (App. 197). On July 13, 1943, the plaintiff sent Mr. Hogan a letter of protest, purporting to be signed by certain members of No. 33 (App. 59). In reply to this letter, the defendant on July 17, 1943, as Secretary-Treasurer of the National association and under its official seal, wrote the plaintiff the alleged libelous letter (App. 204), in which he explained to plaintiff the reasons for inserting the advertisement in the official magazine and, at the same time, criticized the plaintiff for his lack of coop-

eration in a number of instances and his alacrity to find fault with the National officers. One specific criticism was respecting the plaintiff's attitude on the so-called *John Ericsson* case, which contained the alleged libelous statement, to-wit:

" . . . You are not kidding anyone by trying to make the back door agreement that you made with the U. S. Lines Company on the John Ericsson stick. We will get that case settled some day despite your efforts to block it." (App. 206)

This letter was sent to the plaintiff and to those who signed the above-mentioned letter of protest (App. 59), with the exception of five men who did not appear from the records of the National office to be members of Local No. 33 (App. 60). Copies of this letter were also sent to the delegates to the National Convention of the Marine Engineers Beneficial Association (App. 59).

On November 25, 1941, the plaintiff, on behalf of the Union, entered into a written agreement with the U. S. Lines Co. respecting wages and working conditions for marine engineers on its vessels (App. 16). This agreement covered only so-called Class "C" vessels. On December 31, 1941 there was turned over to the U. S. Lines Co. by the Maritime Commission the motor vessel *John Ericsson* (App. 100), formerly known as the *Kungsholm* (App. 103). The U. S. Lines was ordered by the Government to have the vessel ready as a troop ship within three days (App. 103). The *John Ericsson* was larger than any Class "C" vessel and the wages and working conditions were not covered by the November 25, 1941 agreement (App. 113). There was no time for the plaintiff to negotiate a formal written agreement. The defendant was informed and believed that the plaintiff had an informal, or verbal, agreement as to wages and working conditions under which the *John Ericsson* sailed (App. 124).

Following a dispute as to the proper wages to be paid on this vessel, the U. S. Lines on November 6, 1942, wrote the

National Marine Engineers Beneficial Association (Defendant's Exhibit "A"—App. 236), setting out the wage scale which it stated it had agreed with the plaintiff was to be paid on that vessel (App. 237). The matter was referred to the National War Emergency Board, where it was handled by the defendant on behalf of the National organization in an endeavor to secure a higher wage scale (App. 119); and one of the criticisms of the plaintiff by the defendant in the letter of July 17th was the plaintiff's lack of cooperation in the fight to secure such higher wage scales.

Shortly after the receipt of this alleged libelous letter, the plaintiff on August 11, 1943 filed his complaint for libel, alleging that the defendant intended to convey by the above quoted expression that the plaintiff was "disloyal to the members of his union" and that he "immorally, unethically and unlawfully caused an agreement to be made with the U. S. Lines Company contrary to the interests and well-being of the members of plaintiff's union" (App. 4). He alleged no special damage. The defendant answered admitting the writing of the letter and its publication but denying that the expression had the meaning or intended to convey the meaning ascribed to it by the plaintiff (App. 6).

The cause came on for trial before the Court and a jury. At the conclusion of the plaintiff's case, defendant moved for a directed verdict (App. 87), which was overruled (App. 99). This motion was renewed at the conclusion of the entire case and again denied (App. 172). Defendant prayed the Court to instruct the jury that the alleged libelous letter was qualifiedly privileged. The Court refused all of defendant's requested instructions on this point (App. 190-193). The case was submitted to the jury and resulted in a verdict and judgment for the plaintiff in the sum of \$1,500 compensatory damages plus \$1,000 punitive damages (App. 193). From this judgment an appeal was taken to this Court.

STATEMENT OF POINTS.

1. The Court erred in not granting the defendant's motion for a directed verdict at the conclusion of the plaintiff's case.

2. The Court erred in refusing to instruct the jury that the alleged libelous communication was qualifiedly privileged.

SUMMARY OF ARGUMENT.

The alleged libelous communication, when read as a whole, taken in its ordinary meaning, was not defamatory; at least, it was not libelous *per se*, and no special damages were alleged or proven. The letter, written from one labor union official to another, sent only to a limited number of union members and officials, in answer to an inquiry, was qualifiedly privileged, and no actual malice having been proven, a verdict should have been directed for the defendant. The occasion being privileged, the lower court should have charged the jury that the burden of proof was on the plaintiff to show that the defendant was motivated by express malice.

ARGUMENT.

I. Motion for Directed Verdict at Conclusion of Plaintiff's Case Should Have Been Granted.

At the conclusion of the plaintiff's case, the defendant moved the Court to direct a verdict in his favor, giving three grounds, which will be argued here in the order in which they were presented in the lower court.

(a) Alleged libelous communication not defamatory.

The plaintiff's contention in the court below was that the defendant, in stating that he had entered into a "back door agreement," defamed him. There was no other language in the alleged libelous letter to explain the meaning of that phrase. It has never, so far as we have been able to learn, been judicially defined.

Webster's unabridged dictionary defines "back door" as "a door in the back part of a building; hence, a private or indirect way." Taking these words in their ordinary meaning, as they must be read, the term "back door agreement" as used in the alleged libelous letter, means an indirect agreement or an agreement entered into in a private way. This could possibly mean nothing more than an informal agreement or an oral understanding. Only an overly sensitive or culpable mind could construe this to be defamatory. Judge Learned Hand has succinctly stated it:—

"It is indeed not true that all ridicule * * * or all disagreeable comment * * * is actionable; a man must not be too thin-skinned or a self-important prig * * *. It must expose the plaintiff to more than trivial ridicule." *Burton v. Crowell Pub. Co.*, 2 Cir., 82 F. (2d) 154, 155.

Defamation, in its broadest sense, means to blacken the reputation or expose one to public hatred, contempt or ridicule (33 Am. Jur. 38). It is inconceivable that the mere statement that defendant had entered into an informal agreement, without anything more, could expose him to public hatred, ridicule or contempt.

This Court, in *Caldwell v. Hayden*, 42 App. D. C. 166, 169, had before it a somewhat similar set of facts. In that case plaintiff sued the defendant, president of a local labor union, for uttering the following words:

"Brother Caldwell sits in his parlor in the quiet solitude and sanctity of his home, and frames up a contract which is altogether contrary to the rules of this organization, and has the audacity to bring it here and try to palm it off on the members of this local as a bona fide contract."

It was alleged that this statement intended to charge that the plaintiff put up a bogus contract on the members and falsely and wilfully forged a contract. The Court, in sustaining a demurrer to the declaration, held that these words were not actionable, stating:

"It does not appear in the language used by defendant that plaintiff was not authorized to enter into the alleged contract, subject to the approval of the union, or that the contract was not properly executed on the part of the railway company. It therefore fails to impute to plaintiff the commission of the crime of forgery.

"The language attributed to defendant amounted to nothing more than a mere criticism of plaintiff's action in connection with securing the contract. There is nothing from which the commission of a crime or moral turpitude can be inferred. The statement to the effect that it was not a bona fide contract must be interpreted in connection with the context as meaning that it was contrary to the rules and regulations of the union. The words were uttered at a meeting of the union in relation to a matter in which all the members were equally interested, and under circumstances where wide latitude will be tolerated in discussion. So far as appears, the contract may have been procured in accordance with instructions, and may have been satisfactory to every member of the union excepting defendant. Defendant may have been mistaken in his criticism that the contract was contrary to the rules and regulations of the union, but as a member he was entitled to express his opinion."

In the above case there was a criticism of "plaintiff's action in connection with securing the contract." In the instant case defendant did not criticize plaintiff's action in entering into a contract, but only his lack of cooperation with the National organization and endeavoring to make that contract "stick." There is certainly nothing "from which the commission of a crime or moral turpitude can be inferred." The plaintiff urged in the court below, and no doubt will argue to this Court, that the above case has no application here because the words there were spoken, whereas in the instant case they were contained in the alleged libelous communication. There is, however, little distinction in principle between libel and slander. Certainly, to write something does not make it libelous if it were not defamatory in and of itself. The fine distinction between

the two is set out by the Supreme Court in *White v. Nicholls et al.*, 3 How. 266, 11 L. Ed. 591, 600, as follows:

“With regard to that species of defamation which is effected by writing or printing, or by pictures and signs, and which is technically denominated libel, *although in general the rules applicable to it are the same which apply to verbal slander*, yet in other respects it is treated with a sterner rigor than the latter; because it must have been effected with coolness and deliberation, and must be more permanent and extensive in its operation than words, which are frequently the offspring of sudden gusts of passion and soon may be buried in oblivion.” (Emphasis supplied.)

In an early case in this District, *Snowden v. Lindo*, 1 Cr. (1 D. C.) 561, it was held that the words “lying, slanderous rascal,” although printed and published, were not libelous and actionable.

In the recent case of *Potts v. Dies*, 77 U. S. App. D. C. 92, 132 F. (2d) 734, this Court held the words used were fair criticism and not actionable, saying:

“No doubt ‘Nazi Trojan Horse’ is a term of reproach. It expresses an unfavorable opinion of appellant’s publication and perhaps of appellant as its publisher because they praised Hitler, including an opinion that such praise shows Nazi sympathies. But in this context it expresses nothing more.”

In *Rodger v. American Kennel Club, Inc.*, 245 N. Y. S. 662, 138 Misc. 310, the plaintiff was accused in a magazine of misconduct in refusing to return a customer’s money. The Court, at page 666, held:

“ ‘The libel law is not a system of technicalities, but reasonable regulations whereby the public may be furnished news and information, but not false stories about anyone. When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a judgment of libel, no legal harm has been done.’ *Cafferty v. Southern Tier Pub. Co.*, 226 N. Y. 87, 93, 123 N. E. 76, 78.”

And at page 672, said:

“To hold that the article in question imputes fraud to plaintiff requires recourse to extrinsic facts and the use of ‘fine and shaded distinctions’ and of ‘words pressed out of their ordinary usage.’ This we may not do to sustain a charge of libel. The article means just what the words employed impart—that plaintiff was guilty of improper conduct in refusing to return Mrs. Brown’s money received by him under the circumstances shown. Plaintiff sustained no legal harm by the publication thereof.”

The above are but a few illustrations of the extent to which the courts have gone in refusing to hold as libelous far stronger language than that complained of. The alleged libelous communication was at most a criticism of the defendant’s attitude by his superior officer in the National organization. The words were certainly within the range of fair comment or criticism and do not constitute a libel.

In *Belknap v. Ball*, 83 Mich. 583, 21 Am. St. Rep. 622, 47 N. W. 674, 11 L. R. A. 72, it was held that criticism is discursive, or as applicable to libel cases, a censure of the conduct, character or utterances of the person criticized. In *Bearce v. Bass*, 88 Me. 521, 51 Am. St. Rep. 446, 34 Atl. 411, the Court said:

“So long, therefore, as the criticism is confined to his work and does not attack the moral character or professional integrity of the individual, and is fair and reasonable, there is no libel because there is no defamation of the man himself.”

The plaintiff contended that the words “back door agreement” meant that the plaintiff was “disloyal to the members of his Union.” However, the innuendo may not enlarge the meaning of the words used, or ascribe to them a different meaning from that which they would naturally bear, as was stated in *Emde et al. v. San Joaquin County Central Labor Council*, 143 P. (2d) 20 (Calif.):

“Again, the question of violation of contract is a legal conclusion, but, by innuendo, the respondents

have pleaded that the publication was intended to convey the charge that the respondents were dishonest. An innuendo, however, cannot ascribe a meaning to assertedly defamatory matter other or broader than the words themselves naturally bear; it cannot add to, enlarge or change the sense of the published words."

It is apparent from a reading of the whole alleged libelous communication that its tenor is merely one of fair and reasonable criticism of plaintiff's attitude. It is temperate in tone, containing no strong or forceful adjectives. It is common knowledge that labor union officials in discussions among themselves use strong epithets for emphasis. This is particularly true of seafaring men. It is a language they all understand and at the use of which no offense is intended or taken. In the light of these circumstances, defendant's letter, being from one labor union official to another, must be viewed as extremely mild and inoffensive.

At the argument on the motion for a directed verdict, the lower Court assumed that this letter was defamatory and declined to hear argument on this point. In this, we think the lower Court erred. It was apparent on its face that the letter was not libelous and it was the duty of the Judge to direct a verdict for the defendant.

(b) Letter not libelous per se and no special damages either alleged or proven.

If it be assumed for the sake of argument that the letter of July 17, 1943 could be construed to be defamatory, it follows that the complaint can be maintained only by establishing that the letter was libelous *per se*, since no special damages were alleged. To be actionable *per se*, the injurious character of the words must be a fact of common notoriety, established by the general consent of men, and the Court consequently takes judicial notice of it. In such cases the defamation is such that in its natural and proximate consequence it will necessarily cause injury to the person concerned in his personal, social, official or business

relations of life, so that legal injury may be presumed or implied from the bare fact of the publication itself (33 Am. Jur. 40).

The Supreme Court, in *Baker v. Warner*, 231 U. S. 588, 58 L. Ed. 384, 388, reversing 36 App. D. C. 493, held that to publish of the plaintiff, "Where does the money come from in the contest?", followed immediately with, "How about the race track?", was not libelous *per se*, saying:

"The publication was not libelous *per se*. The meaning of the article and the person to whom it referred were so ambiguous that in order to constitute a cause of action it was necessary to set out extrinsic facts which, when coupled with the words, would show that the writer charged the plaintiff with corruption in office."

This Court, when the same case was before it, although reversed by the Supreme Court on other grounds, likewise held the quoted expressions not to be libelous *per se*, saying at page 499:

"While the rule is somewhat indefinite, we find a safe one in *Brooker v. Coffin*, 5 Johns. 188, 4 Am. Dec. 337, and one fully supported by the cases. 'In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable.' Measured by this test, the words used in the publication are not in themselves actionable. They will admit of an interpretation which amounts to nothing more than a permissible criticism of the conduct of plaintiff in his official capacity."

In another case, the Supreme Court in affirming a decision of this Court held that a published item saying, "C shot and killed G," without more, would not be libelous *per se*. It does not set forth the commission of a crime in unambiguous words. *Washington Post Co. v. Chaloner*, 250 U. S. 288, 63 L. Ed. 987, affirming 47 App. D. C. 66.

In *Sullivan v. Meyer*, 67 App. D. C. 228, 91 F. (2d) 301, plaintiff sued because of a published article commenting on

plaintiff's controversy with school officials concerning textbooks dealing with Russia and Communism, the Court saying that this related to plaintiff's attitude toward the question but did not impugn his character or motives, and was therefore not libelous *per se*:

"The defendant demurred to the declaration on the ground that the publication was 'not libelous *per se*' and, hence, that special damage must be alleged. The court below sustained the demurrer, stating that 'the courts have held that a mere pleasantry which may create a smile at the expense of a zealous public minded citizen, but which does not reflect upon his character or hold him up to public ridicule or tend to degrade him is not libelous *per se*'."

In *Heralds of Liberty v. Rankin*, 94 So. 849, 850, 130 Misc. 698, the defendant, a benevolent insurance society, sent a letter to the 200 members of its society from whom the plaintiff collected dues as agent, notifying them to pay no further premiums to plaintiff as it was necessary for the protection of its membership to change collectors. In holding that the lower court erred in not sustaining the demurrer to the declaration, the Court said:

"From this language there is nothing which tends to injure the reputation of the appellee or expose her to public hatred, contempt or ridicule, or disgrace her in society, lessen her in public esteem or lower her in the confidence of the community. Neither is there in this letter any language which imputes that she is unworthy of credit and which naturally tends to injure her good standing and good name in the community, or lower her in the confidence and respect of her neighbors.

"Before being actionable *per se*, this letter must have had the above effect. * * *"

In a case which was recently before the Appellate Court of Illinois, the Court said:

"The remarks, 'He is a rat' or 'a dirty rat' and 'He ought to be taken for a ride,' though ill chosen and harsh, do not constitute actionable slander. The latter

is more in the nature of a threat, if any meaning can be imputed to it, and the former are not defamatory *per se* because neither of the utterances impute a crime, unchastity, loathsome communicable disease, or dishonesty or unfitness in his business." *Parker v. Kirkland*, 298 Ill. App. 340, 18 N. E. (2d) 709.

Many more illustrative cases could be cited showing the tendency of the courts to deny that publications are libelous *per se* unless it is very apparent on the face of such publications that the language is of such extreme seriousness and extreme violence that no other conclusion could be reached. This is particularly true in the case of labor relations and union disputes. See the most recent note in 150 A. L. R. 932, *et seq.*

If to insinuate that someone was corrupt in office and receiving money from a race track, to state that a person shot and killed another, to say of a person that he is a rat, a dirty rat and ought to be taken for a ride, or to intimate that an agent had been guilty of misappropriation of dues collected is not libelous in and of itself, how can it be said that defendant's criticism of the plaintiff for attempting to make his agreement "stick", instead of cooperating in securing a new agreement, is libelous *per se*? While the phrase "back door agreement" may be ambiguous in the sense that persons may differ as to its exact meaning; nevertheless, the sentence specifically complained of, "You are not kidding anyone by trying to make the back door agreement that you made with the U. S. Lines Company on the John Ericson stick," is so unambiguous in the sense that it cannot be possibly construed to be libelous in and of itself, that it was the duty of the Court to take the case from the jury.

(c) Alleged libelous communication qualifiedly privileged.

The alleged libelous letter of July 17, 1943 was written by the defendant, the Secretary-Treasurer of the National Marine Engineers Beneficial Association, on the letterhead

of that Union and impressed with its seal (App. 204). It was addressed to the plaintiff, as secretary of a subordinate local union. It was in reply to a letter of protest, purporting to be signed by certain members of the Local union (App. 201), against an advertisement that appeared in *The American Marine Engineer*, the official magazine of the National organization. It criticized the plaintiff, a subordinate official, on matters strictly confined to the affairs of the Union. It was sent to the members who signed the letter of protest, with the exception of five who did not appear from the records to be members in good standing (App. 60), and to the delegates to the National Convention of the Union. It was not published in any newspaper or even in the official magazine, *The American Marine Engineer*. From these facts it is earnestly contended that the occasion upon which this letter was written was privileged, not the absolute privilege given by the law to judicial and legislative proceedings, but what is known as a qualified privilege.

In one of its earliest cases, *Bailey v. Holland*, 7 App. D. C. 184, 190, this Court defined this privilege, stating:

"In a well considered case in another court of very high authority, the following rule is laid down as 'sanctioned by the highest judicial authority': 'A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to perform, is privileged if made to a person having a corresponding interest or duty, although it contains defamatory matter which, without such privilege, would be libelous and actionable.' *Count Joannes v. Bennett*, 5 Allen 169, 170.

"Both by the terms in which the rule is stated in the last case, and the illustrations of the rule given in *White v. Nicholls*, it is made plain that it is not sufficient that the party making the communication shall have an interest in the matter communicated. The person addressed must have an interest to be affected also, or must occupy such an attitude towards the matter or the party making the communication as to render it a matter of legal or moral duty."

See also: *Ashford v. Evening Star Newspaper Co.*, 41 App. D. C. 395, *Globe Furniture Co. v. Wright*, 49 App. D. C. 315, 265 F. 873, *National Disabled Soldiers League v. Haan*, 55 App. D. C. 243, 4 F. (2d) 436.

A leading recent case, *Louisiana Oil Corp. et al. v. Renno*, 157 So. (Miss.) 705, 98 A. L. R. 1296, 1299, explains this privilege as follows:

“A communication made in good faith and on a subject-matter in which the person making it has an interest, or in reference to which he has a duty, is privileged if made to a person or persons having a corresponding interest or duty, even though it contains matter which without this privilege would be slanderous, provided the statement is made without malice and in good faith. 17 R. C. L. 341; *New Orleans Great Northern R. Co. v. Frazer*, 158 Miss. 407, 130 So. 493; *Newell on Slander and Libel* (4th Ed.) 341.

“There are certain occasions on which a man is entitled to state what he believes to be the truth about another, and in doing so public policy requires that he shall be protected, provided he makes the statement honestly and not for any indirect or wrong motive. Such occasions are called occasions of qualified privilege, for the reason that the protection is not absolute, but depends entirely upon the honesty of purpose with which the statement is made. Among such statements is one made on a subject-matter in which the person making it, and the person to whom it is made, have a legitimate common interest. *Gatley Libel and Slander*, p. 193. The underlying principle is public policy. The question of privilege is for the court on a given state of facts; if the facts are undisputed, the court decides the question and instructs the jury peremptorily: * * *

In the case of *Caldwell v. Hayden*, *supra*, which has hereinbefore been discussed at length, the defendant accused the plaintiff at a union meeting of framing a contract contrary to the rules of the union. The Court held this is to be qualifiedly privileged, stating:

“Plaintiff, by virtue of his membership in the union, and assuming to serve it, was subject to reasonable

criticism in respect of the work performed for the union, and the presumption is that the statement was made under these circumstances without malice and for the good of the order, unless the contrary can be inferred reasonably from the language itself."

It will be noted that the above language was far stronger than that in the case now before this Court. In the alleged libelous letter in this case, defendant did not accuse plaintiff of entering into a contract contrary to the rules of the Union, but merely stated that plaintiff was trying to make an agreement "stick" when the National association was trying to secure a better agreement. Here again the appellee will undoubtedly contend that the above case was an action of slander, not libel, but the distinction between libel and slander as heretofore pointed out is not material in this instance. Thus, in *Spencer v. Amerton*, 1 Moo. & Rob. 470, cited with approval in *Odgers, Libel and Slander*, p. 236, a parish meeting was called to investigate the accounts of the parish constable. One ratepayer was unable to attend, so he wrote a letter to be read to the meeting concerning the constable and his accounts. This letter was held *prima facie* privileged, for had he attended the meeting and made the same charge orally, such speech would have been privileged. Again, in *Fitts v. Davis*, 50 App. D. C. 234, 269 F. 1018, a suit for libel contained in the minutes of a parish meeting, this Court held the case to be privileged, citing as its sole authority, *Caldwell v. Hayden*, *supra*.

In what is generally considered the leading case on the question of qualified privilege in union matters, a labor newspaper published an article denouncing as disloyal members of the union who went to work for an open shop. The article stated that they were "three of the most despicable characters," that they had "sold out their fellow-workers," that "these three labor spies have sold their manhood, if they ever possessed any, for a paltry few dollars," that an individual "has bought and paid for the souls of

three members of the union" and that the union was "fortunate in having lost such traitorous members." The Court, while recognizing that in order to be privileged the publication must not go beyond the reasonable requirements of the occasion, and may lose that privilege by using unwarranted language, held that this publication was privileged, saying:

"The trial court held that the publication was qualifiedly privileged. We are in accord with that holding. The article complained of appeared in the official publication of the labor organizations. The Labor Advocate is published weekly in the interests of organized labor, to keep union members informed concerning matters affecting their interests. The publishers of the article and those to whom it was addressed had a common interest in the matters to which it related. The article, therefore, was qualifiedly privileged." *Berman v. Power Publishing Co. et al.*, 93 Colo. 581, 27 P. (2d) 749, 92 A. L. R. 1024, 1026.

The following are among many which have been held to be privileged occasions or privileged communications: The publication of charges containing defamatory matter, made in a meeting of Congregational ministers against one of its members (*Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698); a complaint made to a church, of which the plaintiff was a member, charging him with perjury (*Remington v. Congdon*, 2 Pick. 310, 13 Am. Dec. 431); words spoken in good faith, within the scope of his defense, by a party on trial before a church meeting, although they disparage private character (*York v. Pease*, 2 Gray, 282); the publication of charges made before a lodge of Masons (*Kirkpatrick v. Eagle Lodge*, 26 Kan. 384, 40 Am. Rep. 316); words in themselves slanderous, uttered in the presence of a conference on church discipline (*Jarvis v. Hatheway*, 3 Johns. 180, 3 Am. Dec. 473); charges preferred by one member of an Odd Fellows' lodge against another member (*Streety v. Wood*, 15 Barb. 105); the letter written by a clergyman to the curate of another clergyman, charging the latter with

wrongdoing (*Whiteley v. Adams*, 15 C. B. N. S. 392, 33 L. J. C. P. N. S. 89, 10 Jur. N. S. 470, 9 L. T. N. S. 483, 12 Week. Rep. 153).

This Court in a recent case, *Pinn v. Lawson et al.*, 63 App. D. C. 370, 72 F. (2d) 742, affirmed a judgment for the defendant where a minister sued the members of his congregation and a newspaper in libel, contending that they falsely accused him of misappropriating \$25.00 of the parish funds. The Court said:

“As to the charges filed with the deacon board of the church by Emma E. Lawson and Helen Martin, the court said that, if these parties had an honest belief, and had probable cause to believe, that the plaintiff had misappropriated the money in the manner in which they charged, and if that was a reasonable belief—such a belief as an ordinary prudent and cautious person would fairly entertain upon the facts—then that would be a privileged communication and would not be libelous.”

Cooley's classification of libels only conditionally privileged (on page 211 of his work on Torts), as including communications by members of “churches and other voluntary bodies, addressed to the body or any official thereof, and stating facts which, if true, it is proper should be thus communicated,” was held applicable to a local lodge's insertion in a Grand Lodge Journal of a committee's report that a member's (plaintiff's) “expulsion on the charge of perjury . . . was well merited,” in *Kirkpatrick v. Eagle Lodge, supra*.

A director's letter to stockholders for contributions to make a supersedeas bond on appeal from judgment against the corporation, in which letter the judgment creditor was called a parasite, thief and law violator, was held qualifiedly privileged, the Court saying:

“It is undisputed in the record that the letter involved was sent only to the stockholders of the appellant. * * * Certainly the letter spoke about a matter

which was of most vital interest to those writing the letter as well as to those receiving the same. Such a letter is believed to be under the authorities of this state a qualified privileged one." *World Oil Co., Inc., v. Hicks*, 46 S. W. (2d) 394, 397, (Texas), error refused.

In *Pritchard v. Wenger*, 110 Atl. 726, 727, 268 Pa. 114, plaintiff, president and manager of a corporation, sued its secretary and treasurer in libel. Both were directors. Plaintiff prepared a contract to give himself additional compensation, and although it was approved by the board of directors, there was some question about it and the stockholders rejected it, removing plaintiff from his office as manager. Plaintiff had drawn additional compensation under the rejected contract, and defendant charged that the plaintiff by this action had abstracted the funds of the corporation. The Court sustained a nonsuit, saying:

"It is plain that the word 'abstract' used in the alleged libel, when read with its context, simply means obtained through the contract, the adoption of which defendant attacked—and nothing more. The letter neither charges theft nor embezzlement; it is not libelous per se and no special damages were pleaded or proved, nor was malice shown.

"* * * Certainly, under these circumstances, the communication now complained of—being written with an apparent full belief in the truth of the very general statements contained therein, by one immediately concerned with the subject-matter in hand, to others with a community of interest, for purposes of their common protection—was properly classed by the court below as privileged, which of itself is sufficient to support the nonsuit."

In *Garcia v. Sociedad de Obreros*, 263 S. W. 943, 944, it was alleged that the appellant, treasurer of an organization, had failed and refused to account for certain funds donated to assist certain people injured by an earthquake at Vera Cruz, Mexico. The Court held this to be qualifiedly privileged, saying:

“* * * and if it was sent to appellant with the approval of the society, as contended by appellant and as admitted in the answer, then appellee was not guilty of libel because it was a privileged communication sent out under its laws and regulations in the discipline of a member.”

In the lower court it was strenuously argued that even conceding the occasion to be privileged, the alleged libelous quotation exceeded the occasion and the privilege was thereby lost. It is true that if the language used is in excess of the occasion the privilege is thereby lost, and the lower court apparently rested its decision on this point. This question was raised in the case of *Bereman v. Power Publishing Co.*, *supra*, where the Court held:

“A communication may lose its qualifiedly privileged character by the use of language of a defamatory nature not warranted by the occasion that called forth the publication. *Denver Public Warehouse Co. v. Holloway*, *supra*. Some of the words in the article in question are in bad taste, no doubt. Less offensive words might have been selected. But we must not overlook the fact that disloyalty to a union is fraught with such possibilities of disaster to the union cause that loyal union members may be excused for referring to it in strong terms of condemnation. The conduct of the plaintiff not unnaturally suggested to the minds of union members such words as ‘traitor,’ ‘spies,’ and ‘despicable.’ Instances are not wanting where disloyalty to secret societies and other organizations, both political and nonpolitical, has been condemned in language not less forceful. The condemnatory words in the article before us were applied to the drivers in connection with the facts stated; they were not intended to apply to the drivers generally or in connection with any other matter. Discussing the question when defamatory words in a communication may be considered as affording, by themselves, evidence of malice, Odgers, in his work on Libel and Slander (5th Ed.) says at page 354: ‘But the test appears to be this. Take the facts as they appeared to the defendant’s mind at the time of publication; are the terms used such as the de-

fendant might have honestly and bona fide employed under the circumstances? If so, the judge should stop the case. For if the defendant honestly believed the plaintiff's conduct to be such as he described it, the mere fact that he used strong words in so describing it is no evidence of malice to go to the jury.'

"In view of all the circumstances, we do not believe that the qualifiedly privileged character of the article in question was lost by reason of the language used."

It certainly cannot be said that the language used in the instant case was too strong, violent or even disproportionate to the occasion, but it will no doubt be urged in this Court as it was in the lower court that the alleged libelous letter, being written in answer to a protest about a certain advertisement, was an occasion which did not warrant the discussion of any other subject, regardless of how reasonable or temperate the language used may have been. In other words, plaintiff would have this Court believe that in answer to the protest letter the defendant could merely say, in effect, "yes" or "no", or lose the privilege. This is not the law. In order to lose the privilege, the defendant must have used the occasion to vent his ill will or hatred towards the plaintiff. As was stated in *People's Life Ins. Co. of Wash., D. C., et al. v. Talley*, 186 S. E. 42, 44:

"It is well recognized that, when the words complained of are uttered upon an occasion of qualified privilege, then in order to recover, it must appear from the evidence that the language used was disproportioned in strength and violence to the occasion, or went beyond the exigency of the occasion, or that the occasion was abused to gratify the ill will of the defendant; * * *"

Defendant's letter was confined strictly to the affairs of the Union. In answer to the protest about the advertisement, it pointed out to the plaintiff wherein he was wrong in his position about that advertisement, and to illustrate went on to show that the plaintiff had been wrong in his attitude on other Union matters, one of which was the *John*

Ericsson case. It contained no extraneous matter whatever. Not only in the alleged libelous sentence, but throughout the entire length of this letter, there was not a single word or insinuation of any personal feeling or any endeavor to gratify the ill will (and there was none) of the defendant.

The alleged libelous letter, it will be remembered, was written in answer to the plaintiff's letter of protest, and in the conduct of the defendant, consisting entirely of an answer to an inquiry, the absence of malice is presumed. See *White v. Nicholls et al.*, *supra*. The plaintiff, having provoked the criticism, cannot later be heard to complain. Thus, in *Mielly v. Soule et al.*, 21 So. 593, 49 La. Ann. 800, the Court, holding a publication to be qualifiedly privileged, concluded:

“At all events, the criticism was provoked, if not fully justified, by the animadversions of the plaintiff, for had it not been for them, the likelihood is the defendant Soule would never have issued the pamphlet.”

In *Parker v. Appalachian Electric Power Co.*, 30 S. E. (2d) 1 (W. Va.), Barker, a field agent for the state's vocational rehabilitation agency, wrote the defendant stating that plaintiff had worked for it for 29 years prior to his injury and that in view of his past excellent record and physical handicap, the defendant might be interested in making some kind of a job adjustment for him. In reply thereto Ficklen, division manager of the defendant, answered that the plaintiff had been given an opportunity to take light work but was more interested in collecting disability insurance; that “he brought suit against the insurance company, made an affidavit that he was totally disabled, got some doctors that were willing to cooperate with him in proving this claim, and the insurance company made a settlement with him.” It was claimed in the innuendo that this accused plaintiff of obtaining money under false pretenses. The Court, in holding this communication to be qualifiedly privileged, concluded:

"Because the statements contained in the Ficklen letter are simply an answer to an inquiry and plain on their face, this declaration should be appraised without regard to the innuendos. It seems clear to the court that the defendants under the allegations of the declaration have not extended or abused the conditionally privileged occasion upon which the letter was written. Unexplained by the innuendos, the letter contains no libelous statement or word and the declaration alleges no set of facts justifying the meaning which plaintiff attempts to attach to the letter by the innuendos. Therefore, the demurrer should have been sustained."

The defendant's attitude in this case is reminiscent of an observation of Lord Cockburn in a kindred situation, "I own I cannot feel much sympathy for a man who, having been the first to make an appeal to public opinion, when he is answered in the same manner by a counter appeal, changes the tribunal which he has himself selected and invokes the arm of the law." *Koenig v. Ritchie*, 3 F. & F. 413.

II. Court Should Have Instructed Jury Alleged Libelous Communication Qualifiedly Privileged.

Unquestionably, under the authorities, the occasion was privileged. This rebuts the prima facie legal inference of malice arising from the publication of libelous matter, and makes it necessary for the plaintiff in order to recover to prove that the defendant was actuated by express malice in publishing the matter complained of. *National Disabled Veterans League v. Haan*, *supra*, citing *White v. Nicholls et al.*, *supra*.

No express malice can be found in the language itself, and hence the lower court should have taken the case from the jury. However, the Court may have felt there was some extrinsic evidence from which an inference of malice could be drawn, which is a question for the jury. We do not agree that there were any such extraneous facts or circum-

stances, but if, nevertheless, the lower court determined to submit the case to the jury, it should have done so with proper instructions. The jury should have been instructed that in order to recover the plaintiff must have shown by the preponderance of the evidence, that the defendant in publishing the alleged libel was motivated by express malice.

Express malice in this connection does not mean malice in law, or the absence of legal excuse, but "malice in the popular sense, the motive of personal spite or ill will" (*Hayden v. Hasbrouck*, 84 Atl. 1087 (R. I.), 42 L. R. A. (N. S.) 1109, 1113); that the communication "was resorted to as a pretense, and as a cover to a malicious design to slander the good name of the plaintiff" (*Remington v. Congdon*, *supra*; "an indirect and wicked motive which induces the defendant to defame the plaintiff" (*Denver Pub. Whse. Co. v. Holloway*, 83 P. 131 (Colo.), 3 L. R. A. (N. S.) 696, 701); "ill will, bad or evil motive, or such gross indifference to the rights of others as will amount to a willful or wanton act" (*World Oil Co., Inc. v. Hicks*, *supra*, citing *Lattimore v. Tyler Commercial College*, 24 S. W. (2d) 361, 363).

In the instant case there was not a scintilla of evidence that this communication was motivated by any personal ill will on the part of the defendant. During the trial in the lower court, the plaintiff devoted a major part of his testimony to denying that he had entered into a "back door agreement" or any other agreement with the U. S. Lines Co. regarding the *John Ericcson*. It was attempted to show by this testimony that the defendant's statement with regard thereto was false, and therefore malicious, but "assuming that the statements in the article were false, such falsity, of itself, is not sufficient to raise the inference that they were maliciously inspired." *Bereman v. Power Publishing Co.*, *supra*; *Henry v. Moberly*, 23 Ind. App. 305, 51 N. E. 497.

In *Emde et al. v. San Joaquin County Central Labor Council*, *supra*, the Court said:

“But even if the charge of violation of contract were false insofar as it referred to the hiring of non-union employees, since the comment was published in a newspaper devoted exclusively to the interests of organized labor, its publication was conditionally privileged. Civ. Code Sec. 47, subd. 3; *Bereman v. Power Publishing Co.*, 93 Col. 581, 27 P. (2d) 749, 92 A. L. R. 1024; note 92 A. L. R. 1029-1032. The communication being qualifiedly privileged, no right of action arose unless the publishers were actuated by malice, and malice ‘is not inferred from the communication or publication.’ Civ. Code Sec. 48; *Bereman v. Power Publishing Co.*, *supra*; *Cooksey v. McGuire*, Tex. Civ. App., 146 S. W. (2d) 480, 483.”

It has further been held that there is no implication of malice even “though the charge imputed in the publication be without foundation.” *Kirkpatrick v. Eagle Lodge*, *supra*. It cannot be said that the defendant’s statement that the plaintiff had entered into a “back door agreement” was “without foundation,” particularly in view of the letter from the U. S. Lines Co. (Defendant’s Exhibit “A”—App. 236), stating specifically that the wage scale under which the vessel sailed had been submitted to and accepted by Mr. Trainer (the plaintiff).

There were no extrinsic facts adduced in evidence showing that the defendant was actuated by motives of personal spite or ill will, independent of the circumstances in which the communication was made, such as an antecedent grudge or a previous dispute. As Judge Keith, speaking for the Court in the case of *Brown v. Norfolk & Western R. Co.*, 100 Va. 619, 42 S. E. 664, 666, 60 L. R. A. 472, said:

“The remarks of Judge Lewis in *Strode v. Clement*, 90 Va. 553, 19 S. E. 177, are applicable in this case: ‘There is no extrinsic evidence of malice, such as an antecedent grudge, or previous disputes, or anything of that sort, between the parties; but the contention is that the language used by the defendant is of itself evidence of malice. Undoubtedly, strong or violent language disproportioned to the occasion may raise an

inference of malice, and thus lose the privilege that otherwise would attach to it. But when the occasion is privileged, the tendency of the courts is not to submit the words to a too strong scrutiny but rather to view them in the light of the facts as they appeared to the defendant; for the question is, not whether the imputations are true, but whether the words are such as the defendant might have honestly employed under the circumstances.' In this case there is no extrinsic evidence of malice, nor is the language complained of so violent or disproportioned to the occasion as to raise an inference of malice. In other words, there is no evidence of malice."

In *People's Life Ins. Co. of Wash., D. C., et al. v. Talley*, *supra*, citing with approval *National Disabled Soldiers League v. Haan*, *supra*, the Court said:

"The real question is, therefore, whether there is any evidence from which the jury might infer that Lilley was actuated by malice in making said statement. We do not think there is. It appears that Lilley made an honest effort to discover the writer of the anonymous letter in question by comparing the handwriting of all the other agents, by consulting experts and by reporting what he had ascertained to the president of the company before he made the communication complained of. In other words, whether the statement to the effect that Talley had written the letter was true or false, it seems apparent that Lilley acted in good faith and in the honest belief that Talley did write the letter. Under these circumstances, there was nothing in the language used which can be said to have been disproportionate in strength or violence or which went beyond the exigency of the occasion in question. Neither is there any extrinsic evidence found in the record of malice on his part towards Talley. On the other hand, it appears that both up to the time this letter came to light and subsequently, Lilley manifested friendly and kind feelings towards Talley and said or did nothing insofar as the evidence discloses which tended to show that he was actuated by any malice or ill will in uttering the words complained of."

The defendant in this case manifested "friendly and kind feelings" towards the plaintiff throughout his testimony. He believed that there had been some kind of a verbal agreement made, and "there was no reason why it shouldn't have been made." The defendant then went on to testify that the boat was turned over to the company on short notice and they had to get the boat moving as quick as they could; they didn't have time to sit down and work out a wage problem. The defendant stated, "At that time it was proper to do that, and I never questioned it at all." (App. 124.) He then explained that he had been over a year trying to get an increase in wages on the vessel before the National War Labor Board and the plaintiff did not assist him, adding "* * * I think under the circumstances I was fully justified in writing to Mr. Trainer as I did * * *" (App. 125). In answer to specific questions—did the defendant have in mind that the plaintiff was dishonest, was being bribed or had sold out his union?—the defendant answered emphatically that he did not (App. 125).

The testimony of the defendant regarding his state of mind when he wrote the letter showed conclusively, and there was no evidence to the contrary, that he manifested a kindly feeling towards the plaintiff and was not inspired by any motive of personal spite or ill will, but had written the letter in pursuance of what he deemed his duty as an officer of the National organization.

The defendant submitted to the Court below seven requested instructions (App. 190-192) (Instruction No. 10 was erroneously marked withdrawn) on the question of qualified privilege, all of which the lower court refused. The Court then charged the jury that if they found the letter to be defamatory, malice would be presumed as a matter of law. In refusing to instruct the jury as requested by the defendant, it is maintained that the lower court erred. Had the Court properly charged the jury on the question of qualified privilege, placing the burden of proving actual malice on the plaintiff, the jury could not have returned a verdict for the plaintiff.

CONCLUSION.

The letter of July 17, 1943 was written by the defendant, Secretary-Treasurer of the National Marine Engineers Beneficial Association, under the seal of that organization, to the plaintiff, a subordinate official of the Union. It was written in answer to a so-called letter of protest about an advertisement. It was sent only to members in good standing who signed that protest and to Convention delegates. It was not published in the official magazine of the Union, or otherwise. In addition to showing that the plaintiff was wrong in protesting about the advertisement, defendant called plaintiff's attention, as he deemed it his duty to do, to other matters in which he had been mistaken. One of these was the libel complained of, that the plaintiff was trying to make the "back door agreement" he made with the U. S. Lines Co. "stick;" in other words, that he was not cooperating with the defendant and the National organization in their attempt to secure before the National War Labor Board a more favorable agreement.

The defendant was justified in stating that the plaintiff had entered into some agreement with the company, in view of the company's letter specifically so stating. Defendant wrote the alleged libelous letter with no feeling of spite or ill will, but solely in the performance of the duties of his office. His language was mild and temperate and did not exceed the exigency of the occasion. This letter, written under these circumstances, it is submitted, was in no sense defamatory. It was certainly not libelous *per se*, and no special damages were alleged or proven. The occasion upon which it was written was qualifiedly privileged, making it incumbent upon the plaintiff to prove actual malice, which he failed to do.

Qualified privilege is founded upon public policy, as is the case of absolute privilege accorded to judicial and legislative proceedings. These latter would be seriously hampered in their performance were they not accorded absolute freedom of expression and criticism for the common

good. If this qualified privilege be denied to societies or organizations such as labor unions, these groups will be unable to freely pursue their normal and usual functions. Members of a labor union would hesitate to take the floor to speak at a meeting; officers of a labor union would hesitate to carry on the ordinary and usual correspondence of their office, fearing a suit for defamation.

It is respectfully submitted that the lower court erred in this case, and should be reversed.

Respectfully submitted,

L. HAROLD SOTHORON,
P. MICHAEL COOK,
815 Fifteenth Street, N. W.,
Washington 5, D. C.,
Attorneys for Appellant.

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8781

JAMES H. BLAKE, *Appellant*,

v.

EDWARD P. TRAINER, *Appellee*.

Appeal from Judgment of the District Court of the United
States for the District of Columbia.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED SEP 19 1944

Joseph W. Stewart

CLERK

JOSEPH P. TUMULTY, JR.,
1317 F Street, N. W.,
Attorney for Appellee.

INDEX TO BRIEF.

	Page
Counter-Statement of the Case	1
Summary of Argument	8
Argument	8
I. Denial of Motion for Directed Verdict at Conclusion of Plaintiff's Case Was Not Error	8
(a) The Trial Court Properly Refused to Direct a Verdict for Defendant Upon the Ground That the Alleged Libelous Communication Was Not Defamatory	9
(b) Plaintiff Was Not Required to Allege or Prove Special Damage	17
(c) The Trial Court Properly Refused to Grant Plaintiff's Motion for a Directed Verdict at the Conclusion of Plaintiff's Case on the Ground that the Alleged Libelous Communication was Qualifiedly Privileged	20
(1) Plaintiff's Evidence of Actual Malice Was Sufficient to Require Submission to the Jury	22
(i) The Defamatory Statement Itself...	22
(ii) The Circumstances Surrounding the Publication of the Defamatory State- ment	25
(iii) Extrinsic Facts	27
(2) The Occasion Was Not Privileged.....	28
(3) If the Occasion Was Privileged, the Privi- lege Was Exceeded	30
II. Refusal of Trial Court to Instruct Jury Alleged Libelous Communication Qualifiedly Privileged Af- fords No Adequate Basis for This Appeal.....	31

	Page
(a) Assuming Refusal to Charge as to Qualified Privilege Was Error, Such Error Was Cured and Rendered Harmless by Verdict Finding Punitive Damages	31
(b) The Trial Court Properly Refused to Instruct the Jury That the Alleged Libelous Communication Was Qualifiedly Privileged	37
Conclusion	37

TABLE OF CASES.

Albert Miller & Co. v. Corte, 107 F. (2nd) 432.....	15
Ashford v. Evening Star Newspaper Co., 41 App. D. C. 395	22, 25
Bailey v. Holland, 7 App. D. C. 184	28
Baker v. Warner, 231 U. S. 588	10
Bradford v. Nat'l Ben. Ass'n, 26 App. D. C. 268.....	33
Brice v. Curtis, 38 App. D. C. 304	21, 37
Carroll v. Paramount Pictures, 3 F. R. D. 95	19
Century Indemnity Co. v. Shakespeare, 74 F. (2nd) 392	33
Chaloner v. Washington Post Co., 36 App. D. C. 231..	10
Consolidated Terminal Corp. v. Drivers, etc. Union 639, 33 F. Sup. 645	13, 18
Corte v. Albert Miller & Co., 309 U. S. 688, 60 Sup. Ct. 890.....	15
Count Joannes v. Bennett, 5 Allen 169, 170.....	28
Grand Trunk Western Ry. Co. v. Lindsay, 201 Fed. 836	33
Hancock v. Case, 2 F. and F. 711	20
Hocks v. Springers, 113 Wis. 123, 87 N. W. 1101.....	29
Hubbard v. Associated Press, 123 F. (2nd) 834.....	10
Kanawha & M. Ry. Co. v. Kerse, 239 U. S. 576, 36 Sup. Ct. 174	33
Lovejoy v. Whitcomb, 174 Mass. 586, 55 N. E. 322....	29
Marino v. DiMarco, 41 App. D. C. 76.....	13
Meyerson v. Hurlbut, 98 F. (2nd) 232, 68 App. D. C. 360	10, 13, 14, 19
Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566	33
National Disabled Soldiers' League v. Haan, 55 App. D. C. 243, 4 F. (2d) 436	22, 25, 37

	Page
Norfolk & Washington Steamboat Co. v. Davis, 12 App. D. C. 306	22, 37
Pollard v. Lyon, 91 U. S. 225, 227, 23 L. Ed. 308.....	19
Randall v. Baltimore & Ohio R. Co., 109 U. S. 478 3 Sup. Ct. 322	9
Sullivan v. Meyer, 91 F. (2nd) 301, 67 App. D. C. 228..	10
Washington Herald Co. v. Berry, 41 App. D. C. 322....	10
Washington Post Co. v. O'Donnell, 43 App. D. C. 215..	13, 27
Washington Times Co. v. Murray, 299 Fed. 903, 55 App. D. C. 32	10
White v. Nicholls, 44 U. S. 266	14, 22, 28

AUTHORITIES.

40 Harvard Law Review 167	14
Newell, Slander and Libel (4th ed.).....	9, 13, 14, 17, 20, 21, 22, 25, 26, 27, 29, 30, 31
Odgers, Libel and Slander (4th ed.)	17

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8781.

JAMES H. BLAKE, *Appellant*,

v.

EDWARD P. TRAINER, *Appellee*.

Appeal from Judgment of the District Court of the United
States for the District of Columbia.

BRIEF FOR APPELLEE.

As appellant's Statement of the Case is incomplete and inaccurate, it is deemed desirable to make the following counter-statement:

COUNTER-STATEMENT OF THE CASE.

This is an action for libel, brought by the appellee, the plaintiff below, against the appellant, the defendant below. Plaintiff is the Secretary and Business Manager of Marine

Engineers' Beneficial Association No. 33 (hereinafter called "MEBA No. 33"), a labor union composed of licensed marine engineers. Defendant is the Secretary and Treasurer of National Marine Engineers' Beneficial Association (hereinafter called the "National Association"), a labor organization with which MEBA No. 33 and various other local unions of marine engineers are affiliated.

The complaint charged that about July 17, 1943, the defendant circulated among members of MEBA No. 33 and affiliated associations and others, a letter containing statements concerning the plaintiff to this effect:

"You are not kidding anyone by trying to make the back door agreement that you made with the U. S. Lines Company on the JOHN ERICSSON stick. We will get that case settled some day despite your efforts to block it."

It was alleged that these statements meant and were intended to mean and convey to the members of the plaintiff's union and affiliated associations and to the public that plaintiff was disloyal to the members of his union, that he immorally, unethically and unlawfully caused an agreement to be made with the United States Lines Company contrary to the interests and well-being of the members of the plaintiff's union and in contravention of his duties as their representative; that is, he immorally, unlawfully and unethically acted contrary to the interests and well-being of the members of his union and in contravention of his duties as their representative; and that the plaintiff was unworthy of the confidence and respect of the members of his union, of his profession, and of the public (App. 4). No special damages were alleged. The defendant admitted that he did publish the letter of July 17, 1943, containing the statements complained of, to plaintiff and others (App. 6, 59). However, he denied the meaning ascribed to those statements by the plaintiff. By amendment to his answer filed by leave of court at the trial after the close of the evidence,

the defendant further pleaded that the statements complained of were qualifiedly privileged (App. 7).

Plaintiff has been business manager, financial secretary and corresponding secretary of MEBA No. 33 since June, 1936 (App. 8). Plaintiff now holds office by virtue of a vote of the membership of MEBA No. 33 at an election held in December, 1942, for a term expiring in December, 1944 (App. 10). He has been selected as a delegate of his local to various annual conventions of the National Association, and has served as chairman of various committees at such conventions (App. 10-11). He receives a salary (App. 12). He has no other occupation or employment and has devoted all of his time to the affairs of MEBA No. 33 since June, 1936 (App. 11). His most important function as business manager is the negotiation with employers of agreements respecting the wages, hours and working conditions of the engineers employed on vessels flying the American flag (App. 12).

Since the plaintiff became business manager of MEBA No. 33 its membership has increased from approximately 460 members to approximately 2500 members and its financial resources have increased from approximately \$2200 to approximately \$65,000 in War Bonds and \$28,000 in cash (App. 12-13). Plaintiff has negotiated on behalf of the National Association of MEBA No. 33 agreements with 80 steamship owners covering some 3,000 vessels and over 200 amendments to such agreements (App. 14). Such agreements have invariably gained improvements in wages or working conditions for the marine engineers plaintiff represents (App. 14). Plaintiff, as representative of MEBA No. 33 or the National Association has made approximately 500 appearances before the National Labor Relations Board (App. 14).

MEBA No. 33 is the second largest local affiliated with the National Association (App. 13). It is located in New York City where practically all the chief shipping companies have their main offices (App. 13).

The offices of the National Association are located in Washington, D. C. (App. 58).

On November 24, 1941, culminating efforts begun in 1936, plaintiff succeeded in securing an agreement with the United States Lines Company covering Class C vessels, namely, vessels having a power tonnage between 7,501 and 12,001 (App. 16). The agreement was negotiated by plaintiff with A. J. McCarthy, senior Vice President of the United States Lines Company, was reduced to writing, sent to the National Association, and printed in its official journal, *The American Marine Engineer* (App. 18). The agreement established a higher wage and manning scale than any other agreement negotiated by plaintiff (App. 14).

On December 31, 1941, following Pearl Harbor, the United States Government, through the Maritime Commission, took over the vessel KUNGSOLM from the Swedish-American Line (App. 228). The KUNGSOLM was a large vessel, having a power tonnage of over 35,000, placing her in Class A-3 (App. 19, 22-3). The vessel was turned over by the Maritime Commission to the U. S. Lines for operation, under orders to embark within three days with troops (App. 103). The vessel was hurriedly manned and dispatched, with a crew of engineers recruited by the U. S. Lines Company (App. 221, 18, 76-9, 80-3). The wage scale for the engineers was fixed by the company without negotiation with the plaintiff (App. 18, 101, 106, 228). The vessel sailed in January, 1942, with troops, and proceeded, via the Panama Canal, to Australia, whence it proceeded to New Caledonia, and from there returned to San Francisco, arriving there in April of 1942 (App. 77-8, 81). It was then placed in dry dock for extensive repairs (App. 110). In June, 1942, just prior to the vessel's sailing, certain replacements in the engineering staff were required (App. 229, 110). West Coast members of MEBA No. 97 objected to signing on under the existing wage scale (App. 110). R. Meriwether, Business Agent of MEBA No. 97 telegraphed the plaintiff inquiring what agreement the JOHN

ERICSSON was under (App. 19). The plaintiff learned from the U. S. Lines Company that the JOHN ERICSSON was formerly the KUNGSHOLM (App. 19). He thereupon wired Meriwether that there was no agreement covering the JOHN ERICSSON (App. 19). Capt. J. F. Devlin, Marine Superintendent of the War Shipping Administration, contacted the National Association and the U. S. Lines Company, and then sent a wire on June 17, 1942, to Meriwether, stating that the vessel had been hurriedly manned and dispatched; that no agreement had been reached regarding the vessel prior to her sailing; that he had been assured by Mr. McCarthy, Vice President of the U. S. Lines Company, that the company would be willing to enter negotiations regarding the vessel; and that any wage scale reached would be retroactive to the sailing of the vessel on its current voyage (App. 221, 127-8). Upon receipt of this wire, the engineers signed the articles and the vessel left for Australia (App. 229).

Plaintiff was informed of the dispute by Mr. S. J. Hogan, President of the National Association (App. 20). The defendant was also cognizant of all developments connected with the dispute (App. 25). Copy of the above-mentioned wire from Devlin to Meriwether, stating that the vessel was "hurriedly manned and dispatched", without an agreement concerning the engineers' wage scale, was sent to the National Office, and seen by the defendant at the time (App. 221, 128).

The plaintiff was requested by Hogan to arrange an appointment with McCarthy to negotiate an agreement, which he did (App. 21). At the request of Hogan, he attended the meeting with McCarthy and his attorney on July 27, 1942, but the meeting resulted in a deadlock (App. 22, 25).

There was a dispute as to the class of the vessel, the company contending she was Class A-2, the Union that she was Class A-3, a larger vessel (App. 22). Plaintiff engaged in research, securing evidence that the vessel was Class A-3, and supplied such evidence to the National Office (App. 23-4).

After the parties had reached a deadlock over the wage scale, the case was, in January, 1943, submitted for settlement to the Maritime War Emergency Board, a government agency (App. 25), under a Statement of Facts (App. 228), which the defendant prepared or saw and approved (App. 144, 148). This Statement of Facts stated:

"In January, 1942, the JOHN ERICSSON left New York without a supplement to the existing collective bargaining agreement having been negotiated to cover the vessel; the Company, however, put into effect the following manning and wage scale," etc.

The Maritime War Emergency Board decided the dispute in favor of the Union in March, 1943, ordering higher wages for the engineers, retroactive to June, 1942 (App. 26). This decision required the approval of the National War Labor Board (App. 26), which approved in April, 1943 (App. 26). In June, 1943, plaintiff learned the company had not put the higher wage scale into effect, and so advised the National Office (App. 27). The National Office then learned that the National War Labor Board had re-opened the case for a hearing (App. 27). Such hearing was, however, not held until October 13, 1943 (App. 27, 122), three months after the publication of the alleged libel.

An advertisement for membership in the Diesel Engineers International Association, an organization including marine engineers operating in the plaintiff's territory, was published in the June issue of the American Marine Engineer, the National Association's magazine (App. 35). Members of the Union protested to the plaintiff, on the ground that the Diesel Engineers' International Association was a rival union, and plaintiff brought the protest to the attention of the National Office (App. 35-6). Mr. Hogan, President of the National Association, wrote the plaintiff on July 12, 1943, stating (App. 36, 198):

"Brother Blake requests me to have you furnish him the names of the members of MEBA No. 33 who

have objected to that advertisement and he will be glad to write to them and explain . . . Therefore, if you will furnish Brother Blake with the names so he can write to them and try at least to explain to them that piece of advertisement, I will appreciate it."

Plaintiff furnished the names (App. 38, 199-200). Defendant then wrote the alleged libelous letter, sending it to 18 signatories to the protest, and also to 20 Convention Representatives and Business Managers of subordinate associations who were not concerned in the protest (App. 40, 59-61). The protest made no reference to the defendant (App. 201).

At the trial, the plaintiff introduced evidence as to his official position and duties, publication, and the circumstances surrounding the publication of the alleged libel. He also introduced evidence tending to prove that the defendant knew or should have known that the charge that the plaintiff had made a "back door agreement" with the U. S. Lines Company covering the JOHN ERICCCSON, and that he was trying to make such agreement stick and to block the award of the National War Labor Board, had no basis in fact. He also introduced evidence tending to prove the meaning of the alleged libel, particularly the term "back door agreement", in maritime union circles. Plaintiff also proved that on June 16, 1943, one month before the publication of the alleged libelous letter, defendant wrote a letter to R. Meriwether in San Francisco in which he expressed pronounced ill-will toward the defendant, and made the statement that "Trainer is playing with the U. S. Lines to gum up that award on the JOHN ERICCCSON" (App. 70, 215, 219).

At the conclusion of the plaintiff's case, as above outlined, the defendant moved for a directed verdict (App. 87). The motion was denied (App. 99). The motion was renewed at the close of the evidence (App. 172) and again denied (App. 180). The trial court refused to instruct the jury that the publication of the alleged defamatory matter

was qualifiedly privileged (App. 179). The jury found a verdict for the plaintiff in the sum of \$1,500 as compensatory damages and \$1,000 as punitive damages (App. 193). From this judgment, the defendant appeals.

SUMMARY OF ARGUMENT.

The alleged libelous communication, taken in the meaning which it conveyed to those to whom it was addressed, was defamatory, and being a libel touching the plaintiff in his business or occupation, was actionable without allegation or proof of special damage. Since the jury found the publication to have been motivated by actual malice, the defense of qualified privilege was unavailable to the defendant, hence it is unnecessary for this Court to decide whether the occasion was one of qualified privilege. However, the determination of the trial court that the statements complained of as libelous were not of a privileged character was correct, since the occasion was not privileged. Even assuming the existence of a privileged occasion, the privilege was exceeded by the use of excessive and unwarrantable expressions, not relevant to the occasion, and by excessive publication.

ARGUMENT.

I. Denial of Motion for Directed Verdict at Conclusion of Plaintiff's Case Was Not Error.

At the conclusion of the plaintiff's case, the defendant made a motion for a directed verdict for the defendant upon the grounds (a) that the alleged libelous publication was not defamatory; (b) that even if defamatory, such publication was not actionable without allegation and proof of special damage; and (c) that the publication was qualifiedly privileged and express malice was not shown (App. 87). The motion was argued (App. 87-99) and overruled (App. 99). At the close of the evidence, the motion was renewed (App. 172), was again argued (App. 172-9), and

again overruled (App. 179). On this appeal, the appellant urges that the denial of the motion for a directed verdict at the conclusion of the plaintiff's case was error (Appellant's Brief, p. 5). Appellant does not contend that the denial of the motion at the close of the evidence was error. Appellant, however, urges that the court's refusal to instruct the jury that the alleged libelous communication was qualifiedly privileged was error (Appellant's Brief, p. 5).

(a) The trial court properly refused to direct a verdict for defendant upon the ground that the alleged libelous communication was not defamatory.

On the argument of this motion at the conclusion of the plaintiff's case, the trial court stated (App. 87):

"I think as to the first ground, namely, the words are not libelous, I think there is evidence here tending to show that they have a special meaning among the members of this union and, if that is so, it is not conclusive, but it does raise an issue on that question . . ."

The trial court was without power to direct a verdict for the defendant on this ground unless there was an absence of all evidence against the defendant on this part of the issue joined. If the evidence tended in any way to establish the cause of action it would have been error to take the case from the jury or to direct a verdict. The court may only direct a verdict when the evidence given by the plaintiff's witnesses, with all the inferences that the jury might justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside. *Randall v. Baltimore & Ohio R. Co.*, 109 U. S. 478, 3 Sup. Ct. 322; Newell, *Slander and Libel* (4th ed.) pp. 801-2.

Where an issue has been raised as to the meaning of the alleged libelous publication, a verdict can be directed only when the trial court can say that the publication is not reasonably capable of any defamatory meaning and cannot

reasonably be understood in any defamatory sense. If reasonably capable of such a meaning and of being so understood, the question whether in fact the alleged libelous language had such a meaning and was so understood must be submitted to the jury. This well-settled rule is stated in *Baker v. Warner*, 231 U. S. 588; *Chaloner v. Washington Post Co.*, 36 App. D. C. 231; *Washington Herald Co. v. Berry*, 41 App. D. C. 322; *Washington Times Co. v. Murray*, 299 Fed. 903, 55 App. D. C. 32; *Meyerson v. Hurlbut*, 98 F. (2nd) 232, 68 App. D. C. 360, cert. den. 305 U. S. 610; *Sullivan v. Meyer*, 91 F. (2nd) 301, 67 App. D. C. 228.

In considering whether the language complained of was capable of a defamatory meaning, the court was obliged to consider what meaning it might convey to those to whom it was addressed. The standard of interpretation to be used in testing allegedly defamatory matter is how those to whom the matter was published would reasonably understand it. *Hubbard v. Associated Press*, 123 F. (2nd) 834.

While the entire expression was alleged to be defamatory, the crux of it was the term "back door agreement". It was necessary for the court only to determine as a preliminary matter whether the expression was capable of a defamatory meaning, and it was then for the jury to determine, upon the whole case, the weight of the evidence as to its meaning in fact.

Plaintiff's evidence tended to establish that in maritime union circles and among members of plaintiff's union the expression had a well-established meaning and significance, which was an agreement secretly made between an official of the union and an employer, repugnant to the interests and advantage of the members of the union and made because of some reward which came to the official in so making such an agreement; and that in this instance the meaning of the term signified that the plaintiff had made a dishonest and corrupt agreement concerning wages and conditions of employment of members of his union in betrayal of the trust which had been reposed in him by those mem-

bers to serve with undivided fidelity the interests and welfare of the members of the union. As such, it was a direct attack upon his character as a man, and upon his integrity and fidelity as an officer of the union.

While the weight of the evidence was a matter for determination by the jury, not by the court, an examination of the record clearly shows that plaintiff's proofs constituted substantial evidence in support of his contention that such was the meaning of the alleged libel. Testimony to that effect was given by the witnesses James P. O'Kane (App. 62) and William J. Garrett (App. 66). These witnesses were recipients of the July 17th letter, and were members of plaintiff's union. The witness O'Kane had been a member of MEBA No. 33 continuously since 1902, and had been its president since 1932 (App. 61). The witness Garrett had held the office of Business Manager of MEBA No. 1 since 1918 and had been a member of the Executive Committee of the National Association from 1918 to 1941 (App. 66).

The qualifications of these witnesses to testify as to the meaning of defendant's language in union circles and their testimony on the question, were unchallenged. Defendant waived cross-examination of both of these witnesses (App. 65, 70).

Plaintiff also introduced the testimony of witness Moe Byne, also a member of MEBA No. 33 (App. 72). Mr. Byne had been an officer of the International Seamen's Union and of the National Maritime Union, holding the office of Treasurer of the latter union, numbering from 45,000 to 50,000 members (App. 73). He also testified in positive terms to the effect that in maritime union circles the language complained of had the meaning contended for by the plaintiff (App. 74-6).

Evidence on this question was also given by the plaintiff himself (App. 42). On cross-examination, plaintiff was challenged to produce a record showing that the term "back door agreement" as used in maritime union circles had

the meaning contended for by plaintiff (App. 46). Plaintiff met this challenge by producing an issue of the union newspaper "The Pilot", published by the National Maritime Union, which contained articles demonstrating beyond question that the term "back door agreement" as employed in maritime union circles had the meaning contended for by plaintiff (App. 46-7). On redirect examination of plaintiff, this newspaper was introduced in evidence and the articles in question were identified (App. 53).

In addition to the above-summarized direct evidence as to the meaning of the term, as it would be read and construed by those to whom it was addressed and others to whose attention it might come, plaintiff also proved (App. 70) that on June 16, 1943, a month before the publication of the alleged libelous letter, defendant had written R. Meriwether, Business Manager of MEBA No. 97, San Francisco, a letter (Plaintiff's Exhibit No. 10), in which, in addition to making certain hostile references to plaintiff, he said:

"It is evident that Trainer is playing with the U. S. Lines to gum up that award on the JOHN ERICSSON" (App. 219).

This letter carries with it a charge of treachery and double-dealing, on the part of plaintiff in violation of the fidelity he owed to his principals, the members of his Union interested in the JOHN ERICSSON case. Relating to the same subject-matter referred to in the alleged libels, it is wholly inconsistent with the defendant's claim that the alleged libel had no sinister meaning, and corroborates the evidence of the plaintiff's witnesses.

Clearly, the plaintiff was entitled to have all of this evidence weighed in the balance by the jury over against such evidence as the defendant might produce.

Given the significance which the plaintiff's evidence tended unquestionably to establish, was the alleged libel defamatory? It is submitted that it was so, beyond doubt.

By defendant's own admission, the office of Business Manager occupied by plaintiff was a position of trust and responsibility, requiring the incumbent to possess the confidence of the union members (App. 85). The relationship is one of principal and agent, and the principals, the union men here, look to the Business Agent to protect their interests in negotiations and dealings affecting the reward they receive for their labors, and the conditions under which they work (App. 12). Being compelled to travel in the performance of their work, the members of plaintiff's union are unable to maintain close contact with their Business Manager (App. 85). Hence the measure of his responsibility is greater, and the relationship of trust and confidence which must exist is indispensable.

Plaintiff's office is one of profit (App. 12). It is his sole employment and had been so since 1936 (App. 11). His office is an elective one, by the union membership, for a two-year term. He had been re-elected from time to time since 1936, and must stand for re-election in December 1944 (App. 10).

Interpreted in the light of their meaning to those addressed, defendant's language imputed to plaintiff unfitness to perform the duties of his office and the want of integrity in the discharge of his duties. The charge was tantamount to one of lack of fidelity on the part of an agent to his principals and corruption of an agent in sacrificing the interest of his principals for personal gain.

It is established beyond question that words imputing to one unfitness for an office of employment of profit, or the want of integrity in the discharge of the duties of such an office or employment, are defamatory. *Newell, op. cit. supra*, p. 185; *Meyerson v. Hurlbut, supra*; *Consolidated Terminal Corp. v. Drivers, etc., Union*, 639, 33 F. Sup. 645; *Washington Post Co. v. O'Donnell*, 43 App. D. C. 215; *Marino v. Di-Marco*, 41 App. D. C. 76.

Clearly the charge touched plaintiff in his office or calling, and imputed misconduct in it. Clearly, also, it had a

natural tendency to occasion the loss of such office. Witness O'Kane testified that if the members of the Union believed that the plaintiff had made a back door agreement "they would throw him out the window" (App. 65).

"Every man has the right to the fruits of his industry and by a fair reputation and character in his particular business to the means of making his industry fruitful. At common law, therefore, an action lies for words which slander a man in his trade or defame him in an honest calling; as, to say of a merchant or tradesman he is a bankrupt or to charge a man with deceit in his trade or other malpractice". Newell, *op. cit. supra*, p. 39.

Words spoken of a person in an office of profit, which have a natural tendency to occasion the loss of such office, or which impute misconduct in it, are actionable; and this principle embraces all temporal offices of profit or trust, without limitation. *White v. Nicholls*, 44 U. S. 266.

In *Meyerson v. Hurlbut*, *supra*, the plaintiff alleged that the defendant had slandered him by saying: "You have been cutting prices to any garages, fleets or dealers . . . You have been buying merchandise from jobbers and reselling below your cost . . . You have been cutting prices to the Standard Oil Company on Timken Roller Bearings. Various Washington jobbers have cut you off an Open Account Basis. Various Washington jobbers have refused to sell merchandise to you." Innuendoes stated that these charges meant that the plaintiff was guilty of fraudulent, unfair and unethical trade practices, and that his credit was bad. No special damages were alleged. From a judgment sustaining the defendant's demurrer, the plaintiff appealed. On appeal the judgment was reversed. It was held that the declaration stated a cause of action because the charge of selling below cost could be a defamation tending to injure plaintiff in his business. See 40 Harv. L. Rev. 167.

If the alleged libelous language, read not critically and with a purpose, if possible, to dull its cutting edge, but as

the average normal and reasonable person of ordinary intelligence, to whom the publication was addressed would read it, is capable of exerting a damaging effect on an individual, in his trade, business, occupation or profession, it may not as a matter of law be held not libelous. *Albert Miller & Co. v. Corte*, 107 F. (2d) 432 (C. C. A., 5th, 1939) cert. den. *Corte v. Albert Miller & Co.*, 309 U. S. 688, 60 Sup. Ct. 890.

Although, when defendant's motion for a directed verdict was made at the conclusion of plaintiff's case, defendant had as yet introduced no evidence to controvert that of the plaintiff, a consideration of defendant's evidence confirms the correctness of the lower court's determination in refusing to direct a verdict on the ground that the words used had an innocent, non-defamatory meaning. Defendant failed to produce a single well qualified witness to testify in support of his contention that the words were innocent and non-defamatory. His evidence on this point was given by three witnesses. None of these witnesses was actively engaged in union affairs, none was a member of plaintiff's union or a recipient of the alleged libelous letter. His witness Frank W. Lee (Reporter's Transcript, p. 20) was the vice president of a bank of which defendant and the National Association were customers. Although he held a union card in a non-maritime union, he had been engaged in the banking business since 1923. His witness Hoyt S. Haddock was an employee of the Office of Price Administration, and also legislative representative for the C. I. O., Maritime Committee. On cross-examination this witness admitted that the words used were capable of the meaning and construction contended for by plaintiff; he also stated that the "back door agreement" has been a plague to the working man and his organization (Reporter's Transcript, p. 198). His witness Herbert J. De Varco was a lawyer; he had represented a rival union and had been opposed by plaintiff in numerous proceedings in which plaintiff had represented MEBA No. 33; upon being

shown the references to "back door agreement" in the issue of "The Pilot," he stated, "Frankly, the terminology used in 'The Pilot' may not accord with my terminology" (App. 167).

Finally, the defendant himself testified (App. 125) that in making the charge he did not mean that plaintiff had been dishonest, or had been bribed, or had sold out his union. As to this evidence the trial court correctly charged the jury as follows (App. 185):

"* * * You may also consider the testimony of the defendant as to his own intention in writing that. That is not necessarily controlling at all. It may or may not appeal to you as a circumstance of importance to be considered. It is a matter for you to say, but you have a right to consider, for the reason that here is a term which has been used and about the meaning as to which there is controversy, and hence, if it be true, and that of course is entirely for you to determine, that Mr. Blake, the defendant, had no feeling of ill-will or anger or vindictiveness against the plaintiff when he wrote the letter of July 17 but that his feelings were friendly and free from animosity and that the letter was written in a spirit of goodwill, you can see where it may reflect upon the meaning, because it would hardly be assured that one who was writing in a friendly vein to one against whom he had no feelings would speak ill of him. Only in that way may it be considered as bearing upon the construction to be given the term, and it may be of importance or it may not, according to your own good judgment, as you consider all the other evidence in the case."

The foregoing instruction gave the defendant the full benefit to which he was entitled of his protestations of innocent and friendly intentions in circulating the July 17 letter concerning the plaintiff. The jury, which had the opportunity to observe the demeanor and attitude of the witnesses as well as hear their testimony, by their verdict demonstrated that they rejected such protestations as wholly insincere, and they found the weight of the evidence to preponderate, as clearly it did, for the plaintiff.

It should also be noted, in view of the failure of appellant in his brief to acknowledge that an issue of fact existed as to the meaning of the libel, that at the trial, prior to the submission of the case to the jury, defendant's counsel acknowledged that in view of the court's ruling as to privilege, "the real issue in controversy is as to the meaning of the words used, whether they have the infamous and injurious meaning which is claimed by the plaintiff, which he, of course, must prove by the preponderance of the evidence, or whether they have the harmless or inoffensive meaning which Mr. Blake, the defendant, claims they have" (App. 179).

Upon this record, no other course was possible than a denial of defendant's motion for a directed verdict upon the first asserted ground.

(b) Plaintiff was not required to allege or prove special damage.

Defendant misconceives the law of libel in arguing that, assuming the letter of July 17, 1943, to be defamatory, it was necessary for plaintiff to allege and prove special damage.

In an action for libel the plaintiff is not required to show special damage and the distinction in slander between words actionable *per se* and those actionable only upon proof of special damage does not apply. Odgers, *Libel and Slander* (4th ed.) p. 353.

Even in an action for slander, it is not necessary to allege or prove special damage whenever the defamatory words are spoken of the plaintiff in the way of his profession or trade, or disparage him in an office of public trust.

The correct rule is stated in Newell, *Slander and Libel* (4th ed.) Section 745, as follows:

"In the vast majority of cases proof of special damage is not essential to the right of action. Thus, it is not necessary to prove special damage—

(1) *In any action of libel.*

(2) Whenever the words *spoken* impute to the plaintiff the commission of any indictable offense.

(3) Or a contagious disease.

(4) *Or are spoken of him in the way of his profession or trade, or disparage him in an office of public trust.*

(5) Or a want of chastity, or adultery or fornication.

“Such words, from their natural and immediate tendency to produce injury, the law adjudges to be defamatory, although no official loss or damage is or can be proved. Though even in these cases if any special damage has in fact accrued, the plaintiff may of course prove it to aggravate the damages.” (*Italics applied*)

In *Consolidated Terminal Corp. v. Drivers, etc. Union* 639, *supra*, which involved the publication of a false statement that an employer engaged in the manufacture and sale of products to the public was unfair to organized labor, the court said:

“It is urged by the defendants that the allegations do not show that the language used is libelous *per se*, and that the plaintiff has failed to set forth with sufficient particularity the special damages which it is claimed it has suffered. With these contentions, I do not agree. As has been pointed out, labor organizations should and do have a right peaceably to give publicity to labor disputes in which they are interested. Even if such activities do not come within the range of the Sherman Anti-Trust law, such right of free speech must not be abused. This right to publicize the facts concerning a labor dispute carries with it an obligation of self-restraint to prevent the publication of untruth. It cannot be doubted that the publication of a statement to the effect that a person or corporation, engaged in manufacture and sales to the public, is unfair to organized labor, if in truth and in fact such person or corporation is not unfair to organized labor, results in inevitable damage and loss to that person or

corporation. In respect of inevitable damage, such a statement, if false and malicious, can be assimilated to those expressions which are well recognized in the law to be libelous *per se*, and to contend otherwise is to ignore the realities of present day economic life. Special damages are not required to be stated with any more particularity than the nature of the situation permits."

As above stated, the plaintiff's language would have been actionable without allegation or proof of special damage, even if published orally. In *Meyerson v. Hurlbut*, *supra*, a slander case, the court said:

"Since no special damages are alleged, the declaration is demurrable unless defendant's words are actionable as slander *per se*. To be so actionable, spoken words must 'import a charge that the party has been guilty of a criminal offense involving moral turpitude, or that the party is infected with a contagious distemper', or they must be 'prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade.' *Pollard v. Lyon*, 91 U. S. 225, 227, 23 L. Ed. 308. The question here is whether the words are prejudicial to plaintiff in his trade."

In the *Meyerson* case, as heretofore stated, it was held to be slanderous *per se* to say of the plaintiff, a merchant, that plaintiff had been cutting prices, had been buying merchandise and reselling below cost just to hold business, that various jobbers had cut plaintiff off an open account basis, and that jobbers had refused to sell merchandise to plaintiff.

Whatever words have a tendency to hurt, or are calculated to prejudice, a man who seeks his livelihood by any trade or business are actionable, and unless defendant shows a lawful excuse, plaintiff is entitled to recover without allegation or proof of special damage, because falsity of the words and resulting damage are presumed. *Carroll v. Paramount Pictures*, 3 F. R. D. 95.

This being an action for libel, not slander, allegation and proof of special damage were unnecessary. Since the defamatory words touched plaintiff in his business or occupation, special damages would in any case be unnecessary in order to maintain a right of action. Defendant's second asserted ground for his motion for a directed verdict at the close of plaintiff's case was, therefore, without merit.

(c) The trial court properly refused to grant plaintiff's motion for a directed verdict at the conclusion of plaintiff's case on the ground that the alleged libelous communication was qualifiedly privileged.

The refusal of the court to grant defendant's motion at the conclusion of the plaintiff's case upon the ground of qualified privilege, could not constitute reversible error. The judge is not bound to rule whether the occasion is privileged or not till after the defendant has called all his witnesses. *Hancock v. Case*, 2 F. and F. 711; *Newell, op. cit. supra*, page 804. The trial court properly exercised its prerogative in the matter in overruling defendant's motion at this stage of the case, when he stated, with reference to the question under discussion, at the conclusion of the argument of counsel (App. 99): " * * * I will overrule the motion now. I will be considering it as we go on. You (defendant's counsel) might renew it (the motion) at the close of the evidence." (Parenthetical matter supplied.) At the close of the evidence, the motion was renewed, the question was argued a second time, and the court, after taking the matter under advisement, concluded that the statements complained of were not of a privileged character (App. 179).

Appellant does not raise on this appeal any question as to the correctness of the trial court's action in overruling the motion for a directed verdict at the close of the evidence. Appellant, however, does contend that the court should have charged the jury that the publication was quali-

fiedly privileged (Appellant's Brief, p. 5). This question is subsequently dealt with.

It is believed that a complete answer to appellant's third asserted ground for its motion for a directed verdict at the conclusion of plaintiff's case is that, as above stated, the court was not *obliged* to rule on the question until it had heard all of the evidence, including that of the defendant's witnesses.

The appellee does not contend that the trial court lacks *power*, in a proper case, to direct a verdict for a defendant upon the ground of qualified privilege. It is the appellee's contention that there is no legal compulsion upon the trial court to grant the motion at such stage of the trial, and, therefore, denial of the motion cannot be reversible error.

Where defendant in an action for libel or slander claims that the alleged defamatory statements were privileged communications, the burden is upon the defendant to show that they were made on an occasion of privilege. *Brice v. Curtis*, 38 App. D. C. 304. The court in deciding whether a communication is privileged or not should have recourse to all the circumstances of the case disclosed by the evidence. *Newell, op. cit. supra*, page 384. It is therefore proper for the court to require that the defendant go forward with his evidence.

If the trial court had directed a verdict for the defendant at the conclusion of the plaintiff's case, such ruling would have been error, because, first, there was evidence sufficient to require submission to the jury that the publication was motivated by actual malice, second, the occasion was not privileged, and, third, assuming the occasion was privileged, the privilege was exceeded by the defendant and lost.

The above questions were fully argued and considered by the trial court before it overruled the defendant's motion (App. 87-99).

(1) PLAINTIFF'S EVIDENCE OF ACTUAL MALICE WAS SUFFICIENT TO REQUIRE SUBMISSION TO THE JURY.

The evidence, briefly summarized, consisted of (i) the defamatory statement itself; (ii) the circumstances surrounding its publication; and (iii) extrinsic facts.

Malice in fact implies a desire and an intention to injure; that is, that the defendant was actuated by ill-will in what he said or did, with a design causelessly or wantonly to injure the plaintiff; and this malice in fact, resting as it must upon the libelous matter itself and the surrounding circumstances tending to prove fact and motive, is a question to be determined by the jury. The jury may find the existence of actual malice from the language of the communication itself, as well as from extrinsic evidence. *Ashford v. Evening Star Newspaper Co.*, 41 App. D. C. 395; *National Disabled Soldiers' League v. Haan*, 55 App. D. C. 243, 4 F. (2d) 436; *White v. Nicholls*, *supra*; *Norfolk & Washington Steamboat Co. v. Davis*, 12 App. D. C. 306; *Newell, op. cit. supra*, pp. 315-6.

Plaintiff's case included not merely *some* evidence, but *substantial* evidence of actual malice. The trial court would have been justified in directing a verdict for the defendant on this issue at the conclusion of the plaintiff's case only if there were no evidence, or no more than a *scintilla* of evidence, of actual malice to go to the jury. *Newell, op. cit. supra*, p. 803.

An examination of the record reveals the following evidence of malice as part of the plaintiff's case.

(i) *The defamatory statement itself.*

The use of intemperate expressions, exaggerated and unwarrantable, in itself affords evidence of malice. *Newell, op. cit. supra*, p. 328.

Plaintiff testified that defendant was fully aware of all that took place in connection with the controversy concerning the JOHN ERICSSON (App. 25). Plaintiff's evidence established the fact that the vessel was taken over by the

United States Government on December 31, 1941; was hastily manned and dispatched without consultation by the U. S. Lines Company with the plaintiff, and without the knowledge of plaintiff; and that the wages were fixed by the Company without any negotiation between the Company and the plaintiff. The evidence further showed that the vessel was used as a troop ship, that she was dispatched via the Panama Canal to the Southwest Pacific, and that she never returned to plaintiff's jurisdiction until long after the dispute arose.

The evidence further showed that the dispute arose in San Francisco in June of 1942; that the plaintiff immediately advised the Business Agent in San Francisco and the National Office in Washington that there was no agreement covering the vessel; and that from that time forward the plaintiff cooperated fully with the National Office in the negotiations with the U. S. Lines Company and the submission of the case to the Maritime War Emergency Board.

Under these circumstances, were the terms used such as the defendant might have honestly and *bona fide* employed under the circumstances? Where was the justification for the statement that the plaintiff had entered into a "back door agreement". Where was there any basis for the statement that the plaintiff was "trying to make the agreement stick," or to "block the settlement of the case?"

The absence of probable cause and falsity of the charge, in view of the testimony as to the defendant's knowledge of the facts, were sufficient, in and of themselves, to raise an imputation of malice. It will not be assumed that one who holds no ill will toward another, will causelessly and wantonly speak ill of him.

In the course of the arguments on the motion, the trial justice laid his finger upon the essential point involved in this part of the appellee's contentions, when he said (App. 89):

"Certainly there is no doubt in my mind that there is evidence tending to show here that the term 'back door agreement' implies an act of dishonesty and betrayal by the official who makes it against the members of his body.

"If that is so, it does charge a dishonorable act and of a serious nature, and it seems to me that there is no privilege to make that charge unless there is some foundation for it, even to members of the Union. There is no privilege to make a false statement of a derogatory nature unless it is predicated upon some reasonable ground, is there?

"Mr. Cook (counsel for defendant): I think there was sufficient evidence to show here that there was some ground of justification for that statement, that statement of itself did not impute a crime or an offense involving moral turpitude.

"The Court: There is some evidence which would tend to justify, at best it would create an issue as to whether there was a reasonable or plausible ground for imparting such information to members of the union. It is not absolute privilege.

"Mr. Cook: No, it is a qualified privilege.

"The Court: A qualified privilege and must be in good faith.

"Mr. Cook: That is right.

"The Court: And which, of course, necessarily implies that there is a reasonable ground to support it, not necessarily that it is true, but that such a statement drawn from facts which a person of reasonable care and caution would be justified in making to the members in their own interest and for their own benefit. . ."

On the evidence presented by the plaintiff, the burden was clearly thrown upon the defendant to go forward with evidence showing some fact or circumstance known to him reasonably to justify the language employed. In the absence of such evidence, his intemperate, exaggerated and unwarrantable expressions stand forth as in themselves evidence of actual malice.

Where the language used, though taken in connection with what was in the defendant's mind at the time, is

"much too violent for the occasion and circumstances to which it is applied," or "utterly beyond and disproportionate to the facts", or where improper motives are unnecessarily imputed, there is evidence of malice to go to the jury. For in such a case it may be inferred that the defendant bore plaintiff a grudge, or had some sinister motive in writing as he did. Newell, *op. cit. supra*, p. 328, and cases cited.

(ii) *The circumstances surrounding the publication of the defamatory statement.*

The circumstances surrounding the publication of the defamatory statement are clearly relevant upon the issue of malice. *Ashford v. Evening Star Newspaper Co.*, *supra*; *National Disabled Soldiers' League v. Haan*, *supra*.

It appeared from the plaintiff's evidence that the plaintiff brought to the attention of the President of the National Association, Mr. Hogan, a protest by certain members of the Union against the publication of an advertisement, consisting of an application for membership in the Deisel Engineers' International Association, in the June issue of the Association's magazine, "The American Marine Engineer". There were reasonably adequate grounds for the protest (App. 39-40, 207-11). There was no mention of the defendant in the protest or any criticism of him or of his conduct (App. 201). The matter was one arising within the jurisdiction of the plaintiff, since the Deisel Engineers' International Association, which the plaintiff believed to be potentially or actually a rival union, operated in the territory of MEBA No. 33 (App. 39).

Under these circumstances it was the duty of the plaintiff to present the protest. The defendant's understanding that the organization was "purely a social and educational organization" was plainly erroneous, in view of the facts in plaintiff's possession, that the organization was acting as an agency to secure employment for marine engineers (App. 211-213).

The communication of the protest by the plaintiff was nothing more than a matter of ordinary business falling within the scope of the plaintiff's duties as Business Manager.

Upon receipt of the protest by Mr. Hogan, the latter wrote the plaintiff, asking for the names of the men who protested, because: "Brother Blake requests me to have you furnish him the names of the members of MEBA No. 33 who have objected to that advertisement and he will be glad to write to them and explain . . . if you will furnish Brother Blake with the names so he can write to them and try at least to explain to them that piece of advertisement, I will appreciate it" (App. 198-9). The plaintiff promptly complied with the request. The defendant thereupon published the defamatory letter, circulating it not only among the signatories to the protest, but also among the Business Managers and Convention Representatives of the subordinate associations, numbering 24, who were not concerned in the matter of the protest.

It will be noted that the JOHN ERICSSON case had nothing whatever to do with the matter of the advertisement in *The American Marine Engineer*, or the protest made by the members of the Union. It was wholly unconnected with the occasion for the writing of the letter, as stated by Hogan, the President of the National Association, in requesting the names of the protestants. If, in writing or speaking on a privileged occasion, a person breaks out into irrelevant charges against another, wholly unconnected with the occasion from whence the privilege is derived, such excess may be regarded as evidence of malice. Newell, *op. cit. supra*, p. 332.

Again, the officious action of the defendant in publishing the defamatory statement to the Secretaries and Business Managers of the subordinate associations who were unconcerned in the subject-matter of the protest, is evidence of malice. To give deliberately any unnecessary publicity to statements defamatory of another raises a suspicion of malice. Newell, *op. cit. supra*, p. 332, and cases cited.

(iii) *Extrinsic facts.*

The existence of malice may be shown by extrinsic evidence that the defendant had a grudge against the plaintiff, or that there was previous ill-feeling between the parties. Newell, *op. cit, supra*, p. 326; *Washington Post Co. v. O'Donnell, supra*. If plaintiff can prove that before the time of publication defendant had any ill-feeling against him, that is some evidence that the ill-feeling existed also at the date of the publication.

As part of his case plaintiff proved that on June 16, 1943, approximately one month prior to the publication of the defamatory letter (July 17), defendant wrote a letter (Plaintiff's Exhibit No. 10) to the Business Manager of MEBA No. 97, San Francisco, in which defendant made certain unfriendly references to the plaintiff (App. 70, 215). In this letter (App. 219), defendant (of the National Office) accused the plaintiff of "pushing the National Office around", of desiring to "do away with the National Office altogether," and stated "I sure as hell will call your hand or anyone else's hand that is simply pushing the National Office around for their own pleasure and satisfaction." The defendant, in the course of these references, repeatedly boasts and threatens to "call Trainer's hand". In the light of this letter, defendant's motive in using the occasion of the protest over the advertisement to defame the plaintiff is made clear. It is apparent that he was lying in wait for an opportunity to "call Trainer's hand". There could be no clearer or more direct evidence of ill-will and oblique design, or of a desire and intention to injure the plaintiff.

It seems evident from the foregoing summary of the plaintiff's evidence on the question of malice that the jury was the proper tribunal to determine its existence or non-existence, and that it would have been error for the court to direct a verdict for defendant upon the ground of qualified privilege.

(2) THE OCCASION WAS NOT PRIVILEGED.

At the time of the publication of July 17 letter, there was no matter pending before the members of the Union with respect either to the JOHN ERICSSON case, or the character or conduct of the plaintiff. The case was in the hands of the National War Labor Board, a government agency, awaiting final action. There were no charges pending against the plaintiff within the Union, and the members to whom defendant addressed the letter had no function or duty to perform with respect to the censure, suspension or expulsion of the plaintiff for any alleged misconduct.

There was, therefore, no occasion to call into play a legal or moral duty on the part of the defendant to make a charge in respect of the character and conduct of the plaintiff to the members of the Union whom he addressed. There was no corresponding interest or duty upon the members addressed with respect to the JOHN ERICSSON case or the plaintiff. The situation, therefore, does not come within the rule of privilege laid down in *Bailey v. Holland*, 7 App. D. C. 184, cited in the Appellant's brief, in which this court said (90):

"In a well considered case in another court of very high authority, the following rule is laid down as sanctioned by the highest judicial authority: 'A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to perform, is privileged if made to a person having a corresponding interest or duty, although it contains defamatory matter which, without such privilege, would be libelous and actionable.' *Count Joannes v. Bennett*, 5 Allen 169, 170.

"Both by the terms in which the rule is stated in the last case, and the illustration of the rule given in *White v. Nicholls*, it is made plain that it is not sufficient that the party making the communication shall have an interest in the matter communicated. The person addressed must have an interest to be affected also, or must occupy such an attitude towards the matter as the party making the communication as to render it a matter of legal or moral duty."

To be within this privilege the statement must be such as the occasion warrants, and must be made in good faith to protect the private interests both of the speaker and of the person addressed. Newell, *op. cit. supra*, p. 461. The policy of the law does not extend the protection of a privilege, even a conditional one, to mere officiousness. See *Lovejoy v. Whitcomb*, 174 Mass. 586, 55 N. E. 322; *Hocks v. Sprangers*, 113 Wis. 123, 87 N. W. 1101.

The appellant cites a number of cases in which persons were assembled together in meeting to act in common counsel upon questions affecting their mutual interests. Obviously, this was not such a case.

Assuming that the persons addressed by the defendant had an interest in the matter, such interest was more or less remote and of the same class as the interest of all of the other members of the Union. Where a large number of persons have an interest more or less remote in the matter, a person will not be privileged in informing them all, by circular or otherwise, unless there is no other way of effecting his object. Thus in the case of most societies, there is a council, or managing committee, or a manager or a body of trustees or directors; and communications made confidentially to them will be privileged which would not be privileged if addressed in the first instance to the whole body of the membership. Such communications ought to be confined in the first instance to those whose duty it is to investigate them. Newell, *op. cit. supra*, p. 470. It is submitted that this was plainly such a case, and that no occasion of privilege existed by reason of community of interest through common membership of the defendant and those addressed by him in the same union.

Appellant also contends in his brief that the protest respecting the advertisement created an occasion of privilege (Appellant's Brief, p. 22). The protest was not an attack upon the character or conduct of the defendant. The protest was in no sense of the word a provocation. It could not reasonably be said that the plaintiff had brought the

defamation upon himself. A defamatory communication when necessary to protect one's own interests, is privileged only when made to persons who also have a duty or interest in respect of the matter. In such cases, it must appear that the defendant was compelled to employ the words complained of. If he could have done all that his duty or interest demanded without libeling or slandering the plaintiff, the words are not privileged. Newell, *op. cit. supra*, p. 450. Even in cases where the privilege of self-defense against false aspersions is invoked by an attack, the privilege extends only to such retorts as are fairly an answer to the attack, or fairly arise out of the charges the plaintiff had made against the defendant.

Here, the defendant's retort was entirely unprovoked, there was no occasion for defense of the defendant's character against false aspersion, and the defendant's defamatory retort was totally unrelated to the protest which plaintiff had transmitted with respect to the advertisement.

It is submitted that the occasion was clearly not one of qualified privilege.

(3). IF THE OCCASION WAS PRIVILEGED, THE PRIVILEGE WAS EXCEEDED.

Assuming, which appellee denies, that the occasion was privileged, by reason of the fact that it was made by a union official to union members as part of a communication relating to the protest respecting the advertisement, nevertheless the privilege does not extend to exaggerated or unwarrantable expressions. It extends to nothing which is not justified by the occasion. The privilege does not extend to the introduction of irrelevant defamatory matter. Newell, *op. cit. supra*, p. 417, 418.

In the instant case, the privilege, if any, was lost by the use of violent language when it was clearly uncalled for. It was lost when the defendant branched out into extraneous matter. It was lost when the defendant circulated the letter among persons who were unconnected with the pro-

test. The privilege, therefore, did not extend to the publication of the defamatory statements.

II. Refusal of Trial Court to Instruct Jury Alleged Libelous Communication Qualifiedly Privileged Affords No Adequate Basis for This Appeal.

(a) Assuming refusal to charge as to qualified privilege was error, such error was cured and rendered harmless by verdict finding punitive damages.

It is unnecessary for this Court to determine whether the trial court should have instructed the jury that the alleged libelous communication was qualifiedly privileged, for the reason that the jury found that the defendant was actuated by express malice in publishing the matter complained of. If express malice be found, the privilege is destroyed. Newell, *Slander and Libel* (4th ed.), p. 382.

The jury was instructed by the trial justice that it might consider returning an award for punitive damages, and in connection therewith the court charged as follows (App. 188-9):

“There are certain essential facts which you must find established by a preponderance of the evidence, however, before you would be justified in returning a verdict of punitive damages. You must find that the libel was published with actual malice as distinguished from legal malice.

“I have defined that term ‘legal malice’ to you. Actual malice or express malice, so called, means that the libelous statement was published through actual ill-will in a spirit of malevolence, that it was prompted, motivated by an actual desire to injure and do harm to the one to whom it refers.

“That might be accomplished either through an affirmative state of mind of that kind or it might occur where one acts in utter reckless disregard of the rights of another and of the injury that would follow by reason of his act, a wantonly reckless act, the necessary result of which would be to injure the character and reputation of another.

“You will consider the evidence fairly and impartially to determine whether or not there was actual malice upon the part of the defendant, Mr. Blake, when he wrote the letter of July 17.

“If you believe not, then you disregard the matter of punitive damages, because you would not be justified unless you found actual malice to exist. But if you believe that such malice did exist and prompted the doing of the wrongful act, then you must go one step further and determine whether or not in this particular case it would be just for you to punish the defendant by assessing these additional damages against him or not. And as to that, you are the sole judges and acting upon the responsibility which I know you feel as jurors will do what in your good, sound judgment is fair and just.

“Should you award punitive damages, I direct that you, through your foreman, separate them from the general damage or compensatory damage. In other words, I suggest it would be well for your foreman, in returning your verdict, if you award only compensatory damages, to say, ‘We find in favor of the plaintiff in the sum of so many dollars as compensatory damages. We do not find punitive damages.’ Or if you find as to both: ‘We find so much money compensatory damages and so much money punitive damages,’ so that I may know, for possible further needs in the case, just what is compensatory damages and just what is punitive damages.”

Under these instructions, the correctness of which defendant has never challenged, the jury brought in a verdict of \$1,500 as compensatory damages and \$1,000 as punitive damages (App. 193). It therefore found that the publication of the libel was motivated by actual malice.

Since actual malice was found to exist, defendant could not be harmed by the court’s ruling as to qualified privilege, even assuming for the sake of argument that such ruling was incorrect.

The refusal to give a proper instruction which would have availed the party nothing, the justice of the case not being affected thereby, does not afford sufficient ground

for the reversal of a judgment. *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566; *Bradford v. Nat'l Ben. Ass'n*, 26 App. D. C. 268.

The verdict of the jury distinctly negatives the hypothesis upon which alone the requested instructions were based, namely, that the publication was in good faith, without actual malice, and upon probable cause for belief as to its truth. *Kanawha & M. Ry. Co. v. Kerse*, 239 U. S. 576, 36 Sup. Ct. 174; *Century Indemnity Co. v. Shakespeare*, 74 F. (2nd) 392; *Grand Trunk Western Ry. Co. v. Lindsay*, 201 Fed. 836, aff'd 233 U. S. 42, 34 Sup. Ct. 581. The verdict left no premise upon which the requested instructions could rest. Accordingly, even assuming there was error in the court's refusal to charge, it was cured and rendered harmless by the verdict.

There was substantial evidence of actual malice to support the jury's verdict. The appellant did not object to the trial court's instruction to the jury, above quoted, upon the subject of punitive damages. Such instruction was predicated upon the existence, in the record, of sufficient evidence to support a finding of punitive damages, and presumably, if defendant had believed there was no evidence of actual malice, or no more than a *scintilla* of evidence thereof, defendant would have objected to the instruction.

Moreover, appellant does not assert, on this appeal, that refusal of the trial court to direct a verdict at the close of the evidence was error. Nor did the defendant move to set aside the verdict, or for a new trial. All of these facts indicate a clear realization on the part of the defendant that there was ample evidence of actual malice to require submission of the issue to the jury, and to support the jury's verdict.

That there was evidence of actual malice introduced by plaintiff as part of plaintiff's *prima facie* case has already been shown. (Appellee's Brief pp. 22 to 27). The defendant's evidence, and the cross-examination of his witnesses, produced further evidence to support the plaintiff's contention upon this issue.

The testimony of A. J. McCarthy (App. 100) and Newbold T. Lawrence (App. 105) officials of the U. S. Lines Company, corroborated plaintiff's evidence as to the absence of any agreement between the Company and the plaintiff, or any communication by the Company with the plaintiff concerning the JOHN ERICSSON, and as to the circumstances under which the vessel was hurriedly manned and dispatched by the Company as a troopship.

The defendant testified to having personal knowledge of the facts with respect to the JOHN ERICSSON dispute from the time the dispute arose in June of 1942 (App. 111). It was claimed that defendant based his belief that there was some kind of oral arrangement in regard to the wage scale on the JOHN ERICSSON, in 1942 (App. 116) upon a letter written by the U. S. Lines Company to Mr. Hogan under date of November 6, 1942 (Defendant's Exhibit A), after the dispute had been pending for many months (App. 115, 236).

Defendant corroborated the testimony of the plaintiff to the effect that the dispute was submitted to the Maritime War Emergency Board in January, 1943, which decided in favor of the union in March, 1943 (App. 120) and that the case was pending before the National War Labor Board in July, 1943, at the time defendant published the defamatory letter (App. 121-2), awaiting a rehearing which was not held until October, 1943, three months after the publication.

Defendant also testified that he had no malice in writing the July 17, letter, stating (App. 124):

"My idea then of whatever Mr. Trainer did with the United States Lines agreement—I didn't have any idea, but what there had been some kind of a verbal agreement made, and there was no reason why it shouldn't have been made . . .

"At the time it was proper to do that and I never questioned it at all, but as the thing kept going on and on, and it appeared we wasn't getting the help from Mr. Trainer that we should have gotten to get this thing adjusted, because he never appeared down here when we had a hearing before any governmental

agency, and if we wanted any information from him, he just never could find it, and it did get where it was very aggravating to us because we (at least I did) considered we had a moral responsibility to these men that kept this boat going."

In the foregoing testimony, defendant admitted he had no basis for making the charge that plaintiff had entered into a "back door agreement" with the U. S. Lines Company. His charge that the plaintiff was trying to make the "back door agreement" stick, and to block the award, was assertedly based upon the plaintiff's alleged failure to appear at any governmental hearing, and failure to supply requested information.

It was shown that there had been no governmental hearing on the case until after the defamatory letter was written (App. 171-2), and that plaintiff had cooperated in connection with the preparation of the Statement of Facts in the dispute, submitted to the Maritime War Emergency Board, by calling attention to two material errors therein, one as to the class of the vessel (one of the principal items in dispute) and the second as to the manning scale, the Statement of Facts prepared by the defendant having shown a manning scale calling for 2 engineers less than the correct number (App. 141-150).

The defendant was unable to specify any instance to support his claim that the plaintiff failed to cooperate with the National office. He was compelled to admit that the delay in obtaining a decision in the case was not and could not have been caused by the plaintiff, but was because of the number of other cases which the governmental bodies had to handle during these times (App. 152-3).

It was further shown, upon cross-examination of the defendant, that defendant had charged, in a paper submitted to the War Labor Board, that the November 6 letter (Defendant's Exhibit A), upon which defendant claimed he relied in making his statement that plaintiff had made a "back door agreement", contained a "deliberate mis-state-

ment" (App. 155), and he also admitted that another statement in the letter was to his own knowledge contrary to fact (App. 134, 136).

The defendant also admitted that he knew that when the November 6, 1942 letter was brought to the plaintiff's attention in November, 1942, the plaintiff said he positively had made no agreement (App. 139, 224).

It was further shown that defendant had stated in a paper filed with the Maritime War Emergency Board in January, 1943, that:

"In January, 1942, the JOHN ERICSSON left New York without a supplement to the existing collective bargaining agreement having been negotiated to cover the vessel; *the Company, however put into effect the following manning and wage scale:*" (Italics supplied).

It was also shown that, at the time in June of 1942, when the dispute was provisionally settled, the defendant had seen a copy of the telegram (Plaintiff's Exhibit No. 11, App. 221) sent by J. F. Devlin, War Shipping Administration, to Meriwether, in which it was stated: "There has been no agreement for this type ship as she was hurriedly manned and dispatched."

Defendant also admitted that he had circulated among the locals on the Pacific Coast (App. 150-1) his June 17, 1943, letter to Meriwether (Plaintiff's Exhibit No. 10), in which he stated that "it is evident that Trainer is playing with the U. S. Lines to gum up the award on the JOHN ERICSSON".

The defendant's testimony established that the defamatory statements were causelessly and wantonly made, that there was no foundation for them, no reasonable or plausible ground for imparting such a charge to the members of the Union. It was such as to raise a clear question of fact as to the good faith of the defendant. The attitude and demeanor of the defendant, his persistence in criticism of the plaintiff, despite his inability to support his statement as to the plaintiff's lack of cooperation, his readiness to

believe and speak ill of him, argued strongly the existence of spite and ill-will.

Furthermore, the defendant unsuccessfully endeavored to attack the character of the defendant and his reputation among union men (App. 157-164). In view of such an attack, how can it possibly be claimed (Appellant's Brief, p. 27), that "the defendant manifested 'friendly and kind feelings' towards the plaintiff"?

(b) The trial court properly refused to instruct the jury that the alleged libelous communication was qualifiedly privileged.

Whether a communication is privileged is a question of law, to be determined by the Court. *Norfolk & Washington Steamboat Co. v. Davis*, supra, *Brice v. Curtis*, supra, *National Disabled Soldiers' League v. Haan*, supra.

At the close of the evidence, this question was argued at length by counsel for the respective parties (App. 172-9). The trial court determined "that the statements complained of in the complaint as libelous are not of a privileged character" (App. 179).

This question has been fully argued in the Appellee's Brief, at pages 28 to 30 and it is deemed unnecessary to repeat the arguments here.

CONCLUSION.

In consideration of all of the foregoing, it is earnestly urged that the judgment appealed from should be affirmed.

Respectfully submitted,

JOSEPH P. TUMULTY, JR.,
1317 F Street, N. W.,
Attorney for Appellee.

JOINT APPENDIX

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8781

JAMES H. BLAKE, *Appellant*,

v.

EDWARD P. TRAINER, *Appellee*.

**Appeal from the District Court of the United States for the
District of Columbia.**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED AUG 10 1944

Joseph R. W. Stewart

CLERK

PRINTED BY BYRON S. ADAMS, WASHINGTON, D. C.

INDEX TO JOINT APPENDIX.

	Page
I. Pleadings Docket Entries, and Other Papers	
Designated	2
Complaint	2
Answer	6
Amendment to Answer	7
II. Excerpts from Testimony and Proceedings Designated	8
Testimony of Edward P. Trainer, Plaintiff.....	8, 167
Direct Examination	8, 167
Cross-Examination	44, 168
Redirect Examination	51, 171
Interrogatories on Behalf of Plaintiff and Replies to Interrogatories	57
Testimony of James P. O'Kane (for Plaintiff)...	62
Testimony of William J. Garrett (for Plaintiff)..	66
Admission of Plaintiff's Exhibit No. 10.....	70
Deposition of Moe Byne (for Plaintiff).....	71
Testimony of Moe Byne (for Plaintiff)	72
Testimony of Carl M. Madsen (for Plaintiff).....	76
Direct Examination	76
Cross-Examination	78
Redirect Examination	79
Testimony of Harry M. Davis (for Plaintiff).....	80
Direct Examination	80
Cross-Examination	83
Deposition of James H. Blake, Defendant.....	84
Motion for Directed Verdict.....	87
Deposition of Alfred J. McCarthy (for Defendant)	100
Deposition of Newbold T. Lawrence (for Defendant)	105
Testimony of James H. Blake, Defendant.....	109
Direct Examination	109
Cross-Examination	125
Redirect Examination	154
Recross-Examination	155
Testimony of Herbert J. Devarco (for Defendant)	155
Direct Examination	155
Cross-Examination	165

	Page
Testimony of James P. O'Kane (for Plaintiff, in rebuttal)	167
Motion for Directed Verdict.....	172
Charge to Jury	179
III. Additional Papers Designated.....	190
Defendant's Requested Instruction No. 1.....	190
Defendant's Requested Instruction No. 2.....	190
Defendant's Requested Instruction No. 4.....	191
Defendant's Requested Instruction No. 5.....	191
Defendant's Requested Instruction No. 6.....	192
Defendant's Requested Instruction No. 8.....	192
Defendant's Requested Instruction No. 10.....	192
Verdict of Jury	193
Judgment	193
Notice of Appeal	194
Memorandum of Deposit of \$250.00, to Operate in Lieu of Bond on Appeal.....	194
Order Extending Time to File Transcript of Record and Docket Appeal	194
Designation of Record	195
Counter-Designation of Record.....	195
IV. Exhibits	197
Plaintiffs's Exhibit No. 3.....	197
Plaintiff's Exhibit No. 4.....	198
Plaintiff's Exhibit No. 5.....	199
Plaintiff's Exhibit No. 6.....	203
Plaintiff's Exhibit No. 7.....	204
Plaintiff's Exhibit No. 9.....	207
Plaintiff's Exhibit No. 9-A.....	211
Plaintiff's Exhibit No. 9-B.....	213
Plaintiff's Exhibit No. 9-C.....	214
Plaintiff's Exhibit No. 10.....	215
Plaintiff's Exhibit No. 11.....	221
Plaintiff's Exhibit No. 12.....	222
Plaintiff's Exhibit No. 13.....	223
Plaintiff's Exhibit No. 14.....	224
Plaintiff's Exhibit No. 15.....	225
Plaintiff's Exhibit No. 16.....	232
Plaintiff's Exhibit No. 17.....	233
Plaintiff's Exhibit No. 18.....	234
Defendant's Exhibit A.....	236

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8781.

JAMES H. BLAKE, *Appellant*,
v.
EDWARD P. TRAINER, *Appellee*.

**Appeal from the District Court of the United States for the
District of Columbia.**

JOINT APPENDIX.

**PLEADINGS, DOCKET ENTRIES AND OTHER
PAPERS DESIGNATED.**

1

Filed Aug 11 1943

Civil Action No. 20823

In the District Court of the United States for the
District of Columbia

EDWARD P. TRAINER, 451 West 24th Street, New York, N. Y.,
Plaintiff,

v.

JAMES H. BLAKE, 315 Machinists Building, 815 Mt. Vernon
Place, N. W., Washington, D. C., *Defendant.*

Complaint for Damages for Defamation.

The plaintiff for his complaint herein by Joseph P. Tumulty, Jr., his attorney, respectfully shows to this Court and alleges:

First: Upon information and belief, at all the times hereinafter mentioned the defendant was and still is a resident of the City of Washington, District of Columbia.

Second: The plaintiff is a resident of the City and State of New York.

Third: The jurisdiction of this Court is based on the general jurisdiction conferred upon it under the Code of Laws for the District of Columbia.

Fourth: The plaintiff is now and has been for many years the financial secretary, corresponding secretary and business manager of No. 33, Marine Engineers' Beneficial Association, which is a Union of licensed marine engineers affiliated with the National Marine Engineers' Beneficial Association.

Fifth: That No. 33 Marine Engineers' Beneficial Association is an unincorporated association consisting of more

2

than 7 members existing under the laws of the State of New York with its principal place of business in New York City.

Sixth: The plaintiff enjoys a position of trust, confidence and honor which he has gained with the members of his Union and throughout the National Union for his industry, skill and integrity with which he devoted himself to the interests of the members of the Union and the duties of the various offices to which the members have done him the honor to elect him, and that he has served the fellow members of his Union with enthusiasm, loyalty and ability which the fellow members of his Union have recognized by the various offices which he has held in that Union. That in his capacity as corresponding secretary and business manager he has been consulted by business managers of other Unions whose problems are similar to those of his Union and by the officers of other Unions with which his Union is affiliated, and that he has established with them a fine reputation for character, ability and integrity which is of vital importance and value to plaintiff, his business career and reputation, and the welfare of his own Union as well as to the welfare of unionism itself.

Seventh: That among his duties as business manager of his Union and as a result of confidence and trust which the members place in his integrity and ability the plaintiff is called upon from time to time to negotiate contracts on behalf of his Union with various shipping concerns in New York City and elsewhere. The Marine Engineers who are the members of plaintiff's Union are employed solely and exclusively on ships and by employers who own and operate those ships. The contracts of employment made with the shipping companies provide for pay, working hours, conditions of employment, and are the very basis of the existence of the Union and the well-being of its members.

Eighth: That at the time of the libelous publication hereinafter referred to, the defendant was and still is the secretary-treasurer of the National Marine Engineers'

Beneficial Association, which maintains offices in the City of Washington, District of Columbia, and is affiliated with the Congress of Industrial Organizations.

Ninth: That on or about July 17, 1943, the defendant, with intent to injure the plaintiff in his business and to injure his good name, credit and reputation, falsely and maliciously prepared, signed and mailed to plaintiff a letter which defendant wilfully and maliciously published, released, circulated and delivered to members of plaintiff's Union and affiliated associations, and to divers other persons, within the District of Columbia and elsewhere, which letter contains false and defamatory statements concerning plaintiff, which among other statements consist of the following:

"... You are not kidding anyone by trying to make the back door agreement that you made with the U. S. Lines Company on the John Ericsson stick. We will get that case settled some day despite your efforts to block it."

The U. S. Lines Company is a shipping company with which the plaintiff in keeping with his duties as business manager was called upon to negotiate. The John Ericsson is the name of an ocean going motorship, operated by the U. S. Lines Company.

The aforesaid libelous statements meant and conveyed and were intended to mean and convey to the members of plaintiff's union and affiliated associations, and to the public, that plaintiff was disloyal to the members of his Union, that plaintiff immorally, unethically and unlawfully caused an agreement to be made with the United States Lines Company contrary to the interests and well-being of the members of plaintiff's Union and in contravention of his duties as their representative, that plaintiff immorally, unethically and unlawfully acted contrary to the interests and well-being of the members of his Union and in contravention of his duties as their representative, and that plaintiff is unworthy of the confidence and respect of

the members of his Union, of his profession, and of the public, and was intended to cast doubt on other contracts negotiated by plaintiff on behalf of the Union, and undermine any confidence in the discharge of any duty plaintiff is called upon to perform.

Tenth: That the aforesaid libelous statements are false and untrue and were known by the defendant to be false and untrue when published and were published maliciously and with the intention of injuring the plaintiff in his good name and to bring him into public scorn, contempt, disgrace and ridicule and with the intention of injury the plaintiff in his business, and the said libelous publication was intended to and was calculated to prejudice the plaintiff in seeking his livelihood and to destroy the trust and confidence in the plaintiff's ability and integrity which existed among the members of his Union.

Eleventh: That by reason of the foregoing the plaintiff has been damaged in the sum of \$50,000.

Wherefore plaintiff demands judgment against the defendant in the sum of \$50,000, together with interest from the 11th day of August, 1943, together with the costs and disbursements of this action.

JOSEPH P. TUMULTY, JR.

Attorney for Plaintiff

1317 F Street, N. W.,

Washington, D. C.

Dated, August 11, 1943.

O'BRIEN, DRISCOLL & RAFTERY

PAUL D. O'BRIEN

MILTON M. ROSENBLOOM

Of Counsel

152 West 42d Street,

New York, N. Y.

* * * * *

Filed Aug 28 1943

Answer

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

(1) The defendant admits the allegations contained in Paragraphs 1, 2, 3, 4 and 5 of the complaint.

(2) The defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6.

(3) The defendant admits that the marine engineers who are members of plaintiff's union are employed solely and exclusively on ships and by employers who own and operate these ships; that the contracts of employment made with the ship companies provide for pay, working hours and conditions of employment, and are the basis of the existence of the union, as alleged in Paragraph 7; but the defendant denies each and every other allegation contained in said paragraph.

6 (4) The defendant admits that on July 17, 1943, he was and still is Secretary-Treasurer of the National Marine Engineers Beneficial Association, which maintains offices in the City of Washington, District of Columbia, and is affiliated with the Congress of Industrial Organizations, as alleged in Paragraph 8 of the complaint; but the defendant denies each and every other allegation contained in said paragraph.

(5) The defendant admits that on July 17, 1943, he wrote and mailed to plaintiff a letter containing the statement quoted in Paragraph 9 of the complaint, and admits that the U. S. Lines Company is a shipping company and The John Ericsson is the name of an ocean-going motorship operated by said company, as alleged in said paragraph of the complaint; but the defendant denies each and every other allegation contained in said paragraph.

(6) The defendant denies each and every allegation contained in Paragraph 10 of the complaint.

(7) The defendant denies the allegations contained in Paragraph 11 of the complaint.

L. HAROLD SOTHORON

P. MICHAEL COOK

815 Fifteenth Street, N. W.

Washington, D. C.

Attorneys for the Defendant.

Service of the above answer had by mailing a copy thereof, postpaid, to Joseph P. Tumulty, Jr., 1317 F Street, N. W., attorney for the plaintiff, this 28th day of August, 1943.

L HAROLD SOTHORON

Attorney for the Defendant

* * * * *

7

Filed Feb 18 1944

Amendment to Answer

By leave of Court first had and obtained, the Answer of the defendant is amended by adding the following:

Third Defense

The words complained of by the plaintiff are qualifiedly privileged.

L. HAROLD SOTHORON

P. MICHAEL COOK

Attorneys for Defendant.

Let this be filed.

JAMES M PROCTOR

Justice

Service of a copy of the above Amendment to Answer accepted this 18th day of February, 1944.

JOSEPH P. TUMULTY, JR.

Attorney for Plaintiff

* * * * *

II.

**EXCERPTS FROM TESTIMONY AND PROCEEDINGS
DESIGNATED.**

42 **Edward P. Trainer**, a witness called on behalf of
the plaintiff, * * *

Direct Examination

By Mr. Tumulty:

Q. State your full name. A. Edward P. Trainer.

Q. Where do you reside? A. 451 West 24th Street, New
York City, New York.

Q. What is your age? A. 57 years old.

43 Q. Are you an American citizen? A. Yes, sir.

Q. Are you the plaintiff in this action? A. I am.

Q. What is your occupation? A. Marine engineer.

Q. For how long have you been a marine engineer? A.
Twenty-six years, since 1918.

Q. In the practice of your trade as a marine engineer,
did you go to sea? A. I did.

Q. For how long? A. For about twenty-five years.

Q. Did you experience various grades of employment in
the maritime service? A. Yes, sir, I was fireman, oiler,
junior engineer, third assistant, second assistant, first as-
sistant, and chief engineer.

Q. When did you first become a member of Local No. 33
of the Marine Engineers Beneficial Association? A. In
1918.

Q. What grade did you hold at that time? A. Third
assistant.

Q. For how long have you been a member of the
Marine Engineers Beneficial Association? A. Twenty-six
years.

44 Q. Will you please tell us what Local No. 33 M. E.
B. A. is? A. Local No. 33, or No. 3 is an association
that is affiliated to the National Marine Engineers Beneficial

Association. It is an organization of licensed marine engineers.

Q. Do you know the defendant, Mr. James H. Blake?

A. I do.

Q. Does he hold an office in the association? A. He does.

Q. What is that office? A. National Secretary and Treasurer of the National M. E. B. A.

Q. When did you first hold office in the Marine Engineers Beneficial Association? A. In 1924.

Q. In what local were you then an officer? A. 33.

Q. What was your job? A. Outside organizer.

Q. What were your duties in that job? A. To contact the men on the ships and persuade them to join the union.

Q. For how long did you hold that job? A. That was for seven months.

45 Q. Then, what did you do? A. I went back to sea again.

Q. What was your next official position? A. That was in 1932, outside organizer again.

Q. How long did you hold that position? A. For about three months or four mnths.

Q. Then, you held a position in the union after that? A. Yes.

Q. What position did you hold? A. I held the position of Acting Business Manager.

Q. When did you become Acting Business Manager of No. 33? A. In June 1936.

Q. Under what circumstances did you become Acting Business Manager? A. The then Business Manager became seriously ill and they decided they would have to have somebody in his place.

Q. How were you selected? A. The National President came along and contacted me and asked me if I would take the job—the National President, Bill Brown, and of course, when I said I would, then there was a meeting of the union and at the meeting of the union I was elected Acting Business Manager.

Q. And have you held the position of Acting Business Manager ever since? A. No, I held the position of Acting Business Manager from June, 1936, to December, 1936, when an election made me the permanent business manager.

Q. And have you been re-elected from time to time since 1936? A. Yes.

Q. At the present time do you hold office by virtue of an election by the members? A. Yes, by a referendum vote of the whole membership.

Q. When was that vote held? A. That vote was held in 1942, December, 1942.

Q. And you were elected for a term of office? A. Two years.

Q. When does your term of office expire? A. It expires in December, 1944, this year.

Q. Have you ever held any other positions or offices in the union? A. I was Special District Deputy appointed by the National President.

Q. When were you appointed to that office? A. From January 1937 to, I believe, sometime in 1940, May or June of 1940. Then I resigned.

Q. Will you explain to the jury how the officers of the National Association are selected. A. There are approximately 40 local unions affiliated with the National Marine Engineers Beneficial Association. They have the right to select delegates to the annual conventions according to the size of their membership.

Then, at the convention, the national officers are elected by annual conventions. Once every two years the national officers are elected.

Q. Have you ever been a delegate to a convention? A. Yes, I have been a delegate from every convention since and including 1937, except in 1938 and 1940, which was held in San Francisco.

Q. At these conventions, do the members of the convention elect any officers of the association? A. Yes, they elect

the National President, the National Secretary-Treasurer, the National Executive Committee, and the first, second, and third Vice-Presidents.

Q. And are there committees selected at these conventions? A. Yes, there are committees selected.

Q. Have you ever been a member or chairman of a committee elected by the convention? A. Yes, I have been chairman of the Good and Welfare Committee, chairman of the Grievance Committee, chairman of the Constitution Committee—at various conventions, of course.

48 Q. Will you kindly explain the offices you hold in No. 33 at the present time and which you held on July 17, 1943? A. I was financial secretary, correspondence secretary, and business manager.

Q. Do you have any other occupation or employment? A. None whatever.

Q. For how long have you devoted all of your time to the affairs of No. 33 in the National Association? A. Since June 1936.

Q. In these offices you hold, will you please explain to the jury the nature of the functions that you perform? A. I supervise the men who go out on the ships and contact the membership and sort of maintain the morale of the membership of the marine engineers toward our organization. I look after the books, am bonded to the extent of \$5,000, to see that the financial accounts of the union are properly kept, and the main job, though, is contacting the employers and getting agreements that will affect the wages, hours, and working conditions of the members of the union.

* * * * *

49 By Mr. Tumulty:

Q. Mr. Trainer, will you kindly explain the kind of work a marine engineer does? A. A marine engineer is a person that is licensed by the Bureau of Marine Inspection and Navigation of the United States Coast Guard to be in

charge of the operation and maintenance of the boilers, engine, and other machinery on board all vessels flying the United States Flag.

* * * * *

50 By Mr. Tumulty:

Q. You say that the negotiation of agreements is the main job that you perform? A. Yes, sir.

Q. Why is that the most important of your functions? A. Well, the wages and hours and working conditions that a union secures for its membership is in itself the very life of the union. If it is unable to affect hours, wages, and working conditions, it would perish, so, to get better conditions and at the same time not ask for something
51 absurd and something that would only bring on the extreme hostility of the employer, why, it is the main function of this union I am representing.

Q. Do you receive compensation for your services to the union? A. I do.

Q. What is your salary? A. \$310 a month.

Q. Was that the salary that you received when you originally became business manager? A. No, sir.

Q. What salary did you receive at that time? A. For three months I received nothing, until we built the organization up. Then I got \$50 a week.

Q. And that compensation has been increased since? A. Yes.

Q. Do the members pay dues to the organization? A. They do, sir.

Q. Will you please explain what the situation of the union, Local No. 33, was at the time you became Acting Business Manager? A. It had no agreements whatever with deep water ships made in its name. It had five agreements with the railroads in its own name, that was all.

52 Q. What was its financial condition? A. It had \$2,200 in its treasury.

Q. How many members did it have? A. It had 460 members in good standing, that is, who had paid dues from January 1 up to June of that year.

Q. What is its present condition? A. Its present condition is that it has got \$65,000 in war bonds and \$28,000 in cash.

Its membership now as of the first of February, we have got as close as I can figure it 2,500 members.

Q. In good standing? A. In good standing—wait a minute—in good standing in this case means when who are not more than twelve months behind in their dues. This is in good standing for the payment of the per capita tax.

Q. What do you mean by the payment of the per capita tax? A. We pay a certain sum to the national association, according to the members that we have that are not more than twelve months behind in their dues each year, pay an annual sum each year to the national association. We tax that amount by the democratic process of our national conventions.

Q. For each man who is a member in good standing in the organization? A. That is right.

53 Q. And that money is paid to whom? A. To the national association.

Q. Of which Mr. Blake is what? A. He is the Treasurer and we send him the check.

Q. How does No. 33 compare in size with the other locals of the association? A. Averaging over the last seven years, we have been the biggest, but this year we are 200 members short of another organization, or, I think, about perhaps 300 members less than No. 97 in San Francisco.

Q. What is the territory of your local? A. It is in New York City generally and territory contiguous to New York.

Q. Are a great many shipping companies located in that territory? A. There is practically all the chief shipping companies now located in New York, main offices.

Q. How many agreements have you negotiated on behalf of the association since you became business manager? A.

I have negotiated agreements with 80 steamship owners and I have added over 200 amendments to those 80 agreements since 1936.

Q. Have you any knowledge as to approximately how many vessels are covered by these agreements? A. I would say at least 3000 vessels, two or three thousand any way.

54 Q. Between whom was each of these agreements negotiated? A. Between myself and some steamship owner.

Q. When the agreements were negotiated what was done by the agreements? A. When we negotiated the agreements, we raised the wages in each case, sometimes raised them as high as 30 per cent over the wages that prevailed before we made the agreement.

Q. Can you state of your own knowledge that in each of these agreements you have improved the wages or working conditions? A. In each and every agreement I made I raised the wages or got some other advantage for the marine engineers that were members of the whole national association.

Q. Were these agreements that you made reduced to writing? A. They were all reduced to writing. It is illegal to make it in any other way.

Q. And they were signed, were they? A. They were signed.

Q. By whom? A. By myself and by some representative of the steamship owner.

55 Q. In connection with the negotiation of agreements, was it ever necessary for you to appear before the National Labor Relations Board? A. Yes, I did.

Q. Did you make many appearances before that board? A. I made more than 500 appearances. Now, a hearing may last nine days. I don't call that a hearing. I call that nine times appearing, so I have made over 500 daily appearances before the National Labor Relations Board on

behalf of this national association, in New York, Baltimore, and Washington.

Q. What was the purpose of these appearances? A. Filing a representation petition, that is, asking for an election so that we could represent the marine engineers or make a charge of unfair labor practices, a violation of Section 8 of the National Labor Relations Act.

Q. When you negotiate an agreement, would such an agreement bind the men in Local No. 33 exclusively? A. No, it would bind the men after the agreement was made in the name of the Marine Engineers Beneficial Association. It bound all members of the Marine Engineers Beneficial Association, no matter what port they were in.

Q. Would it bind only men in sea ports, in locals that were located at sea ports? A. Only the deep water ports. It would not bind anybody on the Great Lakes or the Rivers.

56 If a member of the Association who was a member of the local of the Great Lakes or on a river should ship on one of the sea-going vessels, would he be bound by the agreement? A. Yes, but his license on the Great Lakes and rivers limits him to the Great Lakes and rivers. A Great Lakes and river man has only a certain kind of license, but a deep water man is licensed to go anywhere, the Great Lakes, rivers, or anywhere else.

Q. If a Great Lakes man secured a license permitting him to be employed on a deep sea vessel, he would be bound by the agreement? A. He would be bound by the agreement, yes.

Q. In the course of your duties as business manager of No. 33, did there ever come a time when you endeavored to secure an agreement covering wages, hours, and working conditions with the U. S. Lines Company? A. Yes, sir.

Q. Where is the U. S. Lines Company located? A. It is located at No. 1 Broadway.

Q. New York City? A. Yes.

Q. Will you state when you first made an effort to secure an agreement from the U. S. Lines Company? A. It began in 1936. We had three elections. We had at least
57 seven unfair labor practice charges and we kept on from 1936 to 1941 before we eventually got our first agreement with the company.

Q. When did you get an agreement with the company? A. November 25, 1941.

Q. What type of vessel did that agreement cover? A. That called for Class C vessels.

Q. Will you explain what a Class C vessel is? A. A Class C vessel is a vessel with a power tonnage between 7,501 and 12,001. It is a medium type cargo ship that does practically most of the transportation by water under all flags, foreign and our own.

It is a type of ship that does most of the work of transportation by water.

The LIBERTY ship is, of course, a Class C vessel.

Q. Would you call a Hog Island vessel a Class C vessel? A. Yes, the Hog Island vessels were just like the old model T Ford, they were all built the same size.

Q. When were they built? A. They were built in 1917, 1918, 1919 and 1920 at the place called Hog Island, an island outside Philadelphia. They were all made the same time and all launched with the same gross tonnage and the same horse power.

Q. And are they any different from Class C vessels in general? A. Not for power tonnage they are
58 not, no.

Q. When they were launched, they were Class C vessels? A. They were all Class C vessels when they were launched.

Q. Has there been any change with respect to any of these Hog Island vessels? A. Yes.

Q. What changes? A. A change has been made in her gross tonnage, by cutting a hole in the bulkhead here (indicating) or taking out a space there, or measuring things slightly different from what they were, by doing this they

reduced the port charges in foreign ports and the canal charges in both the Suez and Panama Canal and Manchester Ship Yards. In that way they operated the ship cheaper than if they had the proper gross tonnage they really had.

Q. Did the agreement that you negotiated with the U. S. Lines cover any Hog Island vessels? A. It covered five.

Q. Did these vessels possess the same power tonnage as the other Class C vessels? A. Two of them, the CAPULA and the ARTIGAS did not have the gross tonnage reduced and they had the same power tonnage as the other vessels, but there were three of them, the QUAKER CITY, THE COLD HARBOR, and another one, I would have to look

at my memorandum—three of them had their gross
59 tonnage reduced and they actually by a horsepower tonnage calculation were in Class D, but the United States Shipping Board in 1928 ruled that a Hog Island ship, no matter what happened to her gross tonnage, was Class C when launched and was Class C for the purpose of paying the engineers and all the rest of the crew.

Q. Was it recognized in the agreement of November 25, 1941, that these Class C vessels or the Hog Island vessels should be in Class C? A. Yes.

Q. And that the men should get the same wages and hours and working conditions as men on Class C vessels? A. Yes.

One other vessel, the SEA WITCH, she was a newly delivered vessel, and she was of size C-1. We didn't know that, neither ourselves nor the owners, when we signed, she actually came in Class B. We didn't find that out until 1942, some six months after the agreement was signed.

Q. How much in excess of Class C was this vessel? A. About twenty-five tons and twelve one hundredths, a very small amount.

Q. Twenty-five tons and twelve? A. 12,027 or 25 tons and twelve one hundredths.

Q. If she had been 12,001, what? A. Class C.

60 Q. It would have been in Class C? A. Yes.

Q. When you negotiated the agreement and it was reduced to writing, what was done with the agreement? A. It was sent to the National Marine Engineers Beneficial Association and they printed it in the official journal.

Q. What is the name of that journal? A. The American Marine Engineer.

Q. And where does that circulate? A. To every member of our association.

Q. With whom was the agreement negotiated? A. With Mr. McCarthy.

Q. Do you know his full name? A. A. J. McCarthy, I think it is. I am not sure. It is on the agreement.

Q. What office does he hold? A. He is Senior-Vice-President of the U. S. Lines, Inc.

Q. Did you establish a high wage scale in this agreement? A. We established not only a high wage scale in this agreement, but a high Manning scale, too.

Q. What do you mean by "Manning scale"? A. The Manning scale is the number of engineers you put on various Class C vessels.

61 Q. You say it was a high scale? A. Yes.

Q. Is it high in relation to the other agreements you made? A. Yes, it was the highest we had.

Q. The highest you had? A. Yes.

Q. On November 25, 1941 when you signed the agreement with the U. S. Lines Company, was there such a vessel in existence as the JOHN ERICSSON? A. No.

Q. When did it first come to your knowledge that the U. S. Lines Company was operating a vessel named JOHN ERICSSON? A. On June 16, 1942, I first heard of the JOHN ERICSSON.

Q. Will you explain the circumstances under which it came to your knowledge? A. I received a telegram from Mr. Merriweather from San Francisco saying—

Q. Will you explain who Mr. Merriweather is? A. He is the business manager in charge of No. 97, M.E.B.A., Marine Engineers Beneficial Association.

Q. Located where? A. At San Francisco.

62 Q. He said: "What agreement is the JOHN ERICSSON under? Can you supply engineers for this vessel?" The 10 per cent—he said something about the wages that were being paid were not what they should be.

Q. Did he state by whom the vessel was operated? A. By the U. S. Lines.

Q. As a result of receiving that telegram, what action did you take? A. I called up the U. S. Lines, Mr. Sinclair, and I asked him "What horsepower tonnage is the JOHN ERICSSON in?" Mr. Sinclair, an employee of the company, says that is the KUNGSHOLM.

Q. What was the KUNGSHOLM? A. The KUNGSHOLM was the biggest Swedish-American ship, flying the Swedish flag, it was the biggest motor ship in the world.

Q. As a result of receiving this information, what action did you take? A. I got together, went out in the hall and tried to get some engineers to send out there, but a little over twenty-four hours afterwards I got a telegram saying that the engineers had all signed on.

Q. Did you make any reply to the inquiry as to what agreement the vessel was under? A. Yes, I sent him a telegram saying: M. S., motor vessel JOHN ERICSSON definitely not under any agreement made by me.

63 Q. Prior to that time, had you ever heard anyone mention the vessel JOHN ERICSSON? A. No.

Q. Was this the first time, on June 16, 1942? A. Yes, that was the first time I heard it.

Q. In January of 1942, did any rumors come to your attention with respect to the KUNGSHOLM? A. Yes.

Q. What were they? A. There was a rumor that the U. S. Lines had taken over the KUNGSHOLM. I called Mr. Sinclair and I said to him "What is this about the KUNGSHOLM? I understand you have got her. Are you going to operate her under the United States Flag or Panamanian Flag?" And he said to me, "The KUNGS-

HOLM, anything about the KUNGSHOLM I know is military information."

Q. Is military information? A. Yes.

Q. And this was in January 1942? A. Yes.

Q. Did he give you any other information? A. He didn't give me no more.

Q. Does the National Labor Relations Board have any jurisdiction over foreign flag vessels? A. None
64 whatever.

Q. And did your agreement with the U. S. Lines cover foreign flag vessels? A. No, the first section of our agreement made with the U. S. Lines said that this agreement applies only to vessels under the United States flag.

The company had vessels under foreign flags.

Q. The company had vessels under foreign flags? A. Yes.

Q. They were not covered by the agreement? A. No, they were not covered by the agreement.

Q. Did you later or at the time you received the telegram from Mr. Merriweather, learn the situation out of which the sending of the telegram to you had arisen? A. Yes.

Q. What was that situation? A. There had been some dispute or grievance developed among the marine engineers on the ship. Apparently they didn't want to sign on.

In the meantime I of course got some telegrams from Hogan explaining things to me.

Q. Who is Hogan? A. The National President.

Q. Where is he located? A. He is located at Washington here.

65 Q. Have you personal knowledge as to whether this dispute you refer to was settled at the time?
A. Yes, it was settled and the vessel sailed on the basis that an agreement would be made for the JOHN ERICSSON for wages, hours and working conditions of the engineers on the ship.

Q. And was that agreement to be retroactive? A. Whatever wages or hours or working conditions they were to get were to be retroactive to June 22, the day the vessel sailed.

Mr. Tumulty: Read the answer.

(Thereupon the reporter read the last answer, as above recorded.)

A. (Continuing) That an agreement would be signed, of course, covering it.

Mr. Cook: May it please the Court, I want to object to the answer and move it be stricken. He was asked if he knew of his personal knowledge that this was the agreement made. It doesn't show that he made this agreement. I think the agreement itself or the man who made that agreement is the best evidence.

The Court: Of course, if there is a written agreement and counsel insists upon his objection, I will have to sustain it.

By Mr. Tumulty:

66 Was this a written agreement? A. No, verbal.

Q. Were you a party to the agreement? A. No, I wasn't.

Q. One of the terms of that agreement was that the parties were to meet and negotiate a formal written agreement; is that correct? A. Yes.

Q. Were you requested to take any action in connection with the negotiation of that agreement? A. I was asked to cooperate with Brother Hogan and Brother Merriweather to secure an agreement with Mr. McCarthy of the U. S. Lines, and I got in touch with McCarthy and did all I possibly could to further those negotiations.

Q. Did you make an appointment to see Mr. McCarthy? A. I called him and asked him what time he would be available, and then Mr. Hogan called him, and in each case McCarthy said he would meet us at the proper time.

We made an appointment for June 30, and then Merriweather couldn't come until July 10, and when he couldn't come along on July 10, we made it July 27.

Q. Was the meeting held on July 27? A. It was.

Q. This is what year? A. 1942.

67 Q. And were you present at the meeting? A. I was present.

Q. Who else was present? A. Mr. O'Kane was present with me.

Q. Who is Mr. O'Kane? A. He is President of Local No. 33.

Q. Is he present in this room? A. Yes, he is present.

Q. Will you point him out? A. He is that gentleman there (indicating).

Q. Who else was present? A. Mr. Hogan, the president of the association, and Mr. McCarthy, of course, and his attorney.

Q. Mr. McCarthy? A. Yes.

Q. The Senior-Vice-President of the United States Lines? A. Yes.

Q. And his attorney? A. We met in No. 1 Broadway, the main offices of the company, in McCarthy's office.

Q. At that meeting what was done by Mr. Hogan, Mr. O'Kane, and yourself? A. We presented the Company a written agreement, a written proposition. They wouldn't
68 take that, but we offered it to them, and they proposed a written agreement to us, and we wouldn't take that.

Q. So there was no agreement reached at that conference? A. No, sir.

Q. Will you explain what the questions were that were in dispute between the parties at that conference? A. The questions in dispute between the parties were wages, the length of the term of the new agreement covering this one vessel, the overtime rate, the arbitration clause. There were at least four or five questions at issue, that is, from our point of view.

Q. With respect to the question of wages, was there an agreement between the parties, that is, between the union representatives and the company's representatives as to the class of the vessel? A. No, they insisted the class of the vessel was A-2. We insisted it was Class A-3, a higher class than theirs.

Q. What is the dividing line between Class A-2 and Class A-3? A. The power tonnage for a Class A-2 ship is not more than 35,000, that is, a sum of the horse power and the gross tonnage. If it is no more than 35,000, then it is in Class A-2. If it is above 35,000, it is in Class A-3.

Q. What was the contention of the company as to the class of the vessel? A. The contention of the company as to the class of the vessel was that her engine horsepower was 14,000 and her gross tonnage 20,300, but she definitely was just within Class A-2.

Q. And was it their contention that the wages that they were paying on the vessel were proper for the Class A-2 vessel? A. That was their contention.

Q. And there was no ground for increasing the wages? A. That is right.

Q. Will you explain what the contention of the union representatives was in respect to that matter? A. The contention of the union representatives was that the vessel was in Class A-3 and if she was in Class A-3 the wages would have to be much higher than what the U. S. Lines were paying at that time when she left San Francisco.

Q. Prior to the conference, did you make any investigation to ascertain what class this vessel should be in? A. Yes.

Q. Explain what you did? A. I first looked at Lloyds. The only thing that Lloyds had was nominal horsepower, and nominal horsepower is not used in this country.

Q. What is Lloyds? A. Lloyds Bureau of Ships. The list of Lloyds is a very thick book, about seven inches thick, and it contains the horsepower and tonnage of every vessel afloat in the world. It is a method of figuring tonnage by nominal horsepower, which is not the method we use in this country.

Q. So you were not able to get any information out of Lloyds? A. No.

Q. Did you do anything else? A. Yes, I called up the Bureau of Marine Inspection and Navigation of the Coast

Guard and I asked Bridges, I said to Mr. Bridges, who was the Lieutenant Commander in charge there, "You have got the ERICCSON documented and she has a certificate of inspection. What is the horsepower?"

He said, "The ERICCSON is not documented, she has no certificate of inspection, she has no horsepower rating." Then that put us in the hole, but I said, "She is a United States Flag vessel." He said, "Maybe she is, but she is not documented." He said, "You will have to go somewhere else," and he said, "Why don't you try the public library?"

So I went up to the public library and I spent five days there going through all the technical magazines, until I found the record of the vessel's trial run. It was built by Boen & Voss in Hamburg, Germany. The first year, the trial run, she had an explosion which killed twelve
71 men, so it was difficult to get the dates of the trial run.

I finally got it and then I got this magazine showing what her horsepower was, and her horsepower was much greater than we thought. It was 14,000 on each shaft and 5,000 in the auxiliary engine room. The horsepower definitely put her in A-3.

I made photostatic copies of the trial run of the vessel and sent them to Merriweather and gave Hogan a copy of them when he came on to New York.

I said, "The A-3 is in the bag. We don't need to worry about that."

Q. I didn't hear the last part. A. The Class A-3 is in the bag, there can't be any argument.

Q. Was that information that you obtained useful in connection with the future negotiations you had in this matter?

A. Yes, because in the list of merchant ships she still appears the JOHN ERICCSON, but without any horsepower.

Q. After you were unable to reach an agreement at the conference on July 27, 1942, were there any further nego-

tiations with the U. S. Lines Company? A. Well, letters passed from that time back and forth.

Q. Letters passed? A. Yes, between Mr. Hogan
72 and the Company.

Q. And did Mr. Hogan keep you informed of the developments? A. Yes, he sent me a copy of the letters.

Q. Do you have any personal knowledge as to whether the defendant, Mr. Blake, was informed of the developments that took place from the time this dispute arose? A. Yes, I have.

Q. Is it your understanding that he was informed of all developments? A. Yes, Mr. Hogan told me at the beginning of the year that he would be placed in charge of all agreements.

Q. After the passage of correspondence between the union and the U. S. Lines Company, did an agreement result? A. No agreement resulted.

Q. There was a deadlock, is that correct? A. There was a deadlock.

Q. Neither side would yield its position? A. I beg your pardon?

Q. Was there any yielding of any position by either parties? A. No, neither side yielded.

Q. What was the next step taken in connection with the dispute? A. The matter was referred to the Mari-
73 time War Emergency Board, a board that exists to settle disputes between the maritime unions and the maritime employers, a government board.

Q. Did it come to your attention that when the matter was submitted to the maritime war emergency board a statement of the facts in the dispute was prepared for submission to the parties? A. Yes.

Q. Did you ever see a copy of the statement? A. Yes.

Q. Was the copy of the statement sent to you? A. Yes.

Q. By whom was it sent? A. By Mr. Hogan.

Q. Did you examine it? A. I did.

Q. After examining it, did you communicate any information to Mr. Hogan? A. I did.

Q. What was the information you communicated? A. I told him the statement of facts for the union's position was entirely wrong.

Q. What was wrong about it? A. He was asking for 16 engineers where we had 18 already. He had put the
74 KUNGSHOLM in the same class as the GRIPSHOLM, which definitely was Class A-2, a lower scale.

Q. As the result of your calling those errors to Mr. Hogan's attention, was any action taken by him? A. Yes, Mr. Hogan changed it, according to what I have said he eliminated, he went back to the 18 engineers, and Merriweather wrote to me and thanked me for what I had done and told Hogan he would have to do it.

Q. After the submission of the case to the Maritime War Emergency Board, was a decision rendered by the Board? A. A decision was rendered about some time in early March, 1943.

Q. And what was the decision? A. The decision was everything that we asked for. It sustained the union's position all along the line.

Q. In what class did the Maritime War Emergency Board place the vessel? A. Definitely in Class A-3, the highest class.

Q. After the decision by the Maritime War Emergency Board, was there any further action necessary to make the award binding on the United States Lines? A. Yes.

Q. What was that action? A. It went to the War Labor Board and the War Labor Board—

Q. What took place before the War Labor Board?
75 A. The War Labor Board on April 5 reaffirmed the decision of the Maritime War Emergency Board.

Q. Between April 5 and June, did you take any action with respect to the matter? A. No, we thought that after the War Labor Board had granted its decision the Company would put it into effect.

Q. Was it put into effect? A. No.

Q. When did it first come to your attention that it had not been put into effect? A. When the vessel came back in about June and I sent a man down to the ship, our representative, Mr. Givnan, and I said, "Find out how those fellows like the new award, the raise." He called me up and said, "The Company won't give them a raise." So I got in touch with Mr. Hogan right away and told him "This award hasn't gone into effect."

Then, two of the engineers came over to see me. They belonged to a local on the West Coast. And I sent them down to Lawrence.

Q. Who is Lawrence? A. Lawrence is personnel manager of the U. S. Lines. He is the manager of the U. S. Lines.

Q. After you found out that the award had not not been put into effect, what action did you take? A. I got
76 in touch with Hogan.

Q. What did you advise him? A. I gave Hogan the facts. I said, "The Company hasn't put this into effect," and he made inquiries and he found out that the company had applied for a rehearing and had gotten it from the War Labor Board.

Q. The War Labor Board had granted a rehearing? A. Yes.

Q. Had that rehearing been held in June of 1943? A. No, it had not.

Q. When was it held? A. It was held sometime about September, I think, 1943.

Q. So that the status of the matter in June and July of 1943 was that a dispute was in the hands of the War Labor Board, which had rendered a favorable decision but had reopened the matter for further hearing? A. Yes.

Q. Which further hearing had not been held? A. No.

Q. In connection with your duties as the business manager, do you have anything to do with the matter of the hiring or sending out of men to man vessels? A. Well,

77 | nominally I am supposed to do it, but we fill about 400 or
 anywhere from 200 to 400 jobs a month and I don't
 know the details of it and I don't keep in touch with
 the details. To get the job done, a man can't make a
 bazaar of his mind. He has to leave those details to sub-
 ordinates.

Q. Do you have subordinates who take care of the matter
 of securing men for the companies when they need engi-
 neers for their vessels? A. Yes.

Q. What is that employee's name? A. The man in charge
 of most of this is a man by the name of Edward Walker.

Q. What are his duties in that regard? A. His duties
 are to keep a book in which the jobs coming in, to make a
 record of the jobs. That is like the debit side of a ledger,
 and then he has another book which shows where he ships
 the men out.

Q. Is that a book which belongs to Local No. 33? A. Posi-
 tively.

Q. And is it kept from day to day by Mr. Walker in the
 course of his duties? A. Yes, but sometimes when he is out
 another man by the name of Polachek makes the entries.

Q. Does he report to you every man he sends out or every
 company who makes inquiry? A. No, I couldn't keep track
 of that in my mind. I say, "Go ahead and make the
 78 | entries, unless something out of the way happens,
 then let me know."

Q. Approximately how many men in a normal month
 would you send out? A. Sometimes 200 and sometimes 400.

Q. Do you have the books and records in which these
 entries are made? A. I have.

79 | Mr. Tumulty: May I see them? I would like to
 have this book marked for identification as Plaintiff's
 Exhibit No. 1.

The Court: All right.

(The book above referred to was thereupon marked for
 identification as Plaintiff's Exhibit No. 1.)

By Mr. Tumulty:

Q. Mr. Trainer, I am handing you Plaintiff's Exhibit No. 1. Will you kindly examine it and explain to the jury what that book is? A. This is a book that is a record of calls, incoming calls from steamship owners of the vacancies they have and that they want to fill by unemployed engineers.

Q. Have you examined the entries in that book since this matter arose? A. Yes, I examined them after I promised Mr. Sothoron when I made a deposition that I would examine every record of a telephone call that came in during the month of January, 1942, and this is what is in it. This is the record of the phone calls dealing with jobs.

Q. For what purpose were you examining the book? A. To find out if there was any basis for the statement that a phone conversation had taken place between myself and McCarthy or anybody else making an agreement for the John Ericcson.

80 Q. What did you find as the result of your examination?

Mr. Cook: If the Court please, before he answers that question, I would like to object to this until this has been properly identified as a book of original entry and offered in evidence, so we have an opportunity to object to it. I don't think he should be permitted to testify to its contents before that.

The Court: Perhaps you might go a little further into the identification of the book.

Mr. Tumulty: Yes.

By Mr. Tumulty:

Q. Can you identify that book as the property of Local 33, Marine Engineers Beneficial Association? A. Yes, sir.

Q. And by whom is the book maintained? A. The book is maintained by Edward Walker.

Q. Who is he? A. He is one of the clerks in our office.

Q. And are the entries in the book made by Mr. Walker? A. Practically all of them. Some are not. You can tell by his handwriting.

Q. Are you familiar with his handwriting? A. Positively.

Q. And is that an official record of the M.E.B.A.
81 No. 33? A. It is part of our official records, yes.

Q. And is it kept by Mr. Walker in the ordinary course of his duties as one of the employees of No. 33? A. Yes.

Mr. Tumulty: I offer this book in evidence.

The Court: It will be received.

Mr. Cook: May it please the Court, I object to the introduction of this in evidence principally on the ground that this was not kept by this witness nor under his immediate supervision. It appears to be a book with a number of hand-written notes in it. It does not appear to be an official record at all of the union. Ordinarily I would not object to any records they want to introduce without formal proof.

The Court: I think it will depend somewhat upon the purpose for which reference is to be made to it. Mr. Tumulty, what is the purpose?

Mr. Tumulty: The purpose of introducing this in evidence is to show that certain inquiries were made of subordinates of Mr. Trainer for men for the M.S. KUNGS-HOLM in January of 1942 and it is offered as proof that at that time there was no such vessel as the JOHN ERICCCSON in existence.

In our opinion that is a material fact in the case.

The Court: You mean there was no call for service for such a ship?

Mr. Tumulty: That it was not brought to the at-
82 tention of any of Mr. Trainer's subordinates that the U. S. Lines Company was operating a ship known as the JOHN ERICCCSON; that the only record which he has of the call for men is a record which shows that on that date certain men were requested for the KUNGSHOLM.

The Court: May I suggest this, Mr. Cook: It is assumed to be a record of the local kept for the purposes for which

Mr. Trainer says and to which counsel agree. It, of course, wouldn't be evidence as to what Mr. Walker or some other person did or did not know.

Mr. Cook: That is correct.

The Court: But would it be proper evidence that there was no record of such a ship among the records of the local? To that extent, wouldn't it be admissible?

Mr. Cook: He is trying to show, if Your Honor please, that from these memoranda of telephone calls that the union had no notice that there was any such vessel as the JOHN ERICCCSON. This is a memorandum kept by Mr. Walker and Mr. Polachek.

Mr. Trainer, an assistant business manager or the district deputy, or any other officer may have had notice and probably did that there was such a vessel as the JOHN ERICCCSON. I don't want to let this in as the record of two—

The Court: (Interposing.) I don't think, if this were admitted, it could be claimed to prove anything more
83 than that there was no such record in that book of such a ship.

Mr. Cook: For that purpose, I would have no objection.

The Court: I don't believe I could admit it for any larger or any broader purpose than that, Mr. Tumulty.

Mr. Tumulty: That is satisfactory, Your Honor. That is the purpose.

The Court: For that limited purpose, it will be admitted.

By Mr. Tumulty:

Q. Mr. Trainer, you have examined the entries in that book? A. Yes, sir.

Q. Did you find any entry in the book for the motorship JOHN ERICCCSON? A. No.

Q. Did you find any entry in the book for the motor ship KUNGSHOLM? A. Yes.

Q. Will you point out those entries? A. The entries were two third assistants for the motor ship KUNGSHOLM, 175 and 25 per cent.

Q. What does "175 and 25 per cent" mean? A. \$175 a month and 25 per cent, the emergency increase, or an increase—\$175 plus 25 per cent of that.

Q. What was your understanding of what those
84 figures mean? A. That would be the wages for this particular job.

Q. Is there a date on that entry? A. There is. The second day of January, 1942.

Q. Do you have any other entries of the KUNGSHOLM?
A. No, that is all I can find. Here is the one.

(The witness examines book.)

This is also under second and first mate: "Mr. Wilson—U. S. Line, Motorship KUNGSHOLM, sails Monday."

This is the second day of January, the men were to be put aboard the vessel, "Burmeister Wayne, 1st, two 2ds, 1 Senior 3d, and a 3d—Sent A. E. Johanson and E. Larson."

That is the two entries.

Q. Do you understand what those entries mean? A. Why, yes, that Mr. Wilson of the U. S. Lines called up for engineers for the Motorship KUNGSHOLM, that she had a Burmeister Wayne engine, identifying the engine so the man wouldn't take a job on an engine he was not familiar with. That is a particular kind of a Diesel engine. And that he wanted a first assistant, two second assistants, one senior third, one third assistant, and he sent two of our members, A. E. Johanson and E. Larson.

Q. What vessel did he want them for? A. For the Motorship KUNGSHOLM.

Q. Was that a well known ship? A. It was the biggest motorship afloat and she was, of course, a Swedish-
85 American line, flying under the Swedish flag.

Q. You say that indicates that Mr. Wilson called up. Did Mr. Wilson call you up? A. No.

Q. Did you have any talk with Mr. Wilson? A. I rarely talked to Mr. Wilson. He is just a minor employee of the line who takes care of replacements.

Q. Can you identify the handwriting in which those particular entries are made? A. Both entries are made in the handwriting of Mr. Edward Walker.

Q. Did Mr. Walker report to you that these calls had been made by Mr. Wilson? A. No, he didn't consider it important. It was a foreign flag ship, and we sent men out to some of the Panamian flag ships of the U. S. Lines.

Q. He didn't report it to you? A. No, he didn't consider it important.

Q. And you didn't know about this until you looked into the records following the taking of your deposition in this case? A. Yes.

Q. Now, I will hand you this black book and ask you to explain to the jury what this book is. A. This book is a record in order to prevent a condition in the union
86 known as back stairs or back door shipping. We make an entry of the jobs that come in and then we make entries of the jobs going out, so that nobody will be able to say so and so was shipped for a cash consideration by the business manager with some back door shipping.

All replacements are put on the board and called from the board and they are sent out in turn.

Q. This is a record of the men sent out? A. This is a record of the men sent out.

Mr. Tumulty: May I have this record marked for identification as Plaintiff's Exhibit No. 2?

(The black book above referred to was thereupon marked for identification as Plaintiff's Exhibit No. 2.)

By Mr. Tumulty:

Q. Is this book the property of No. 33? A. It is.

Q. Is it kept under your supervision? A. It is.

Q. By whom is it kept? A. It is kept jointly by Frank Korb and Edward Walker.

Q. Have you examined this book? A. I have.

Q. Have you examined it as to entries of the ship JOHN ERICSSON or the ship KUNGSHOLM? A. I have
87 examined it for the ship KUNGSHOLM.

Q. When did you first examine it for such entries?
A. After I made my deposition in front of Mr. Sothoron, some time in November it was.

Q. And in examining the book, did you find any entries indicating that men were sent out to either the JOHN ERICSSON or the KUNGSHOLM? A. Yes.

Q. What did you find? A. I found there was a record here in the handwriting of Mr. Walker which says he sent out A. E. Johanson as first assistant on the KUNGSHOLM, Ernest Larson as second assistant on the KUNGSHOLM, and in the handwriting of Frank Korb on the fifth of January there is a record that Arthur Beer was sent as third assistant on the motor vessel KUNGSHOLM.

Mr. Tumulty: Now I offer this book in evidence.

The Court: Is that only for that purpose you stated?

Mr. Tumulty: It is the same purpose that the other book was offered for.

I should like to first ask the witness whether Mr. Korb and Mr. Walker are subordinate employees under your supervision.

The Witness: They are paid employees.

Mr. Cook: May it please the Court, if this book is merely offered for the purpose that these engineers he mentioned were furnished on these days to the KUNGSHOLM, I have no objection.
88

The Court: Very well, received.

(Plaintiff's Exhibits Nos. 1 and 2, previously marked for identification, were received in evidence.)

By Mr. Tumulty:

Q. Similarly, did Mr. Walker or Mr. Korb report to you at the time that he had sent these engineers to the KUNGSHOLM? A. No.

Q. When did you first learn that engineers had been sent to the KUNGSHOLM? A. After I made my deposition to Mr. Sothoron I told him I would go back and examine and see if there was any record there of any phone conversations with the U. S. Lines, and I went through every scrap of paper, and this is the only thing I could get that dealt remotely with the U. S. Lines and the KUNGSHOLM.

Q. Did any of these engineers whose names you have read report to you at the time that they were signing on the KUNGSHOLM? A. They reported to the office that they had signed on the KUNGSHOLM on or about the 7th.

Q. Did they report to you personally? A. No.

Q. Did it come to your knowledge that they had
89 signed on the KUNGSHOLM? A. Oh, yes.

Q. When did that come to your knowledge? A. That was at night time, when I went up around Twenty-third Street, I met one of the men and I said, "How is the KUNGSHOLM?" And he said, "We signed on today."

Q. What date was that? A. That was the seventh.

Q. Now, coming down to June of 1943, did you have occasion to write a letter to Mr. Hogan with reference to the American Marine Engineer? A. To an advertisement that appeared in it, yes.

Q. What was the nature of that advertisement? A. It was an advertisement which was an application for membership in a rival union.

Q. What was the name of that union? A. The International Diesel Engineers Association.

Q. What was the occasion of your bringing that to the attention of Mr. Hogan? A. The members outside at the meeting room, the unemployed men, they got the magazine and they said, "What is this? Are we being asked to join another union?" And they came into the office and I said, "Well, here, if you are not satisfied, if there is a grievance, you know what to do, go out to Mr. Korb, tell him
90 what your grievance is, and then sign it."

Q. And in reporting this protest, do you recall what you stated? What was your statement? A. The statement was that this advertisement for membership, this application for membership in the D. E. I. A. called on a man to violate his oath of obligation, which was that he would not belong to any other association of marine engineers so long as he was a member of the National M.E.B.A.

Q. What is the purpose of that oath? A. That is put in there to prevent men joining company unions and breaking away from the organization that they are a part of.

Q. As the result of your having made that protest, what happened? A. Mr. Hogan wrote back to me and asked me to give him the names so he could give them to Mr. Blake and Mr. Blake would write to him and explain to them that there was nothing wrong with the advertisement.

Mr. Cook: May it please the Court, the witness seems to be testifying from some correspondence and written protests. If so, I think the written protest and correspondence should be introduced as being the best evidence.

The Court: I think that is true, if you insist upon that. If it is of any importance, I think he should have the written agreement here.

91 Mr. Tumulty: I have it here, Your Honor. We have no objection to introducing it, if counsel wants it.

The Court: Suppose you let counsel see it so that he may determine whether or not he wishes to insist upon it.

Mr. Cook: He is testifying as to what the contents of these protests and letters were and I think they are more accurate.

The Court: I assume he is testifying not to its contents but as to its import and, if it is deemed to be of sufficient importance after looking at it, I assume Mr. Tumulty will offer it.

Mr. Cook: I have no objection to its being offered.

The Court: It saves time, of course, if different documents are referred to and we can waive the time of proving

them and reading all their contents, unless you say it is of real importance.

Mr. Cook: It is beginning to be of importance.

The Court: If you do, of course, I will see that you get it.

Mr. Cook: The principal reason I am objecting is because I don't think he is testifying to the contents of the protests or correspondence correctly, and it is beginning to be important in this case.

The Court: Very well, let's have it, then.

(Mr. Tumulty hands paper to Mr. Cook.)

92 By Mr. Tumulty:

Q. I hand you a copy of a letter dated June 29, 1943, signed by you, addressed to Mr. S. J. Hogan, President, National M.E.B.A.; can you identify that? A. I identify that as having been written by me.

Mr. Cook: May it please the Court, I will waive formal proof. I will admit it without formal proof. That will save time.

The Court: Yes.

Mr. Tumulty: Would you mark this Exhibit 3?

(The letter of June 29, 1943 from Mr. Trainer to Mr. Hogan, was marked and received in evidence as Plaintiff's Exhibit No. 3.)

* * * * *

The Court: Who is that addressed to?

93 Mr. Tumulty: That is addressed to Mr. S. J. Hogan, President, National M.E.B.A., dated June 29, 1943.

By Mr. Tumulty:

Q. Can you identify this letter? A. Yes, this is a letter I received from Mr. Hogan on July 12.

Q. Is it in reply to your letter of June 29th? A. Yes, it is.

Mr. Tumulty: I offer that in evidence.

(Letter of July 12, 1943 from Mr. Hogan to Mr. Trainer, was marked and received in evidence as Plaintiff's Exhibit No. 4.)

* * * * *

94 By Mr. Tumulty:

Q. I show you a copy of a letter dated July 13, 1943, addressed to Mr. Hogan, signed by yourself. Can you identify that copy? A. Yes.

Q. What is that? A. That is the copy of a letter I sent to Hogan with an enclosure, giving him a photostat of the signatures of the men who objected to the advertisement in the magazine and why.

Q. What is this which is attached to the letter?
95 A. This is a covering letter.

Q. What is attached to the letter? A. The photostat.

Mr. Tumulty: I offer this copy of a letter and photostat in evidence as Plaintiff's Exhibit No. 5.

Mr. Cook: No objection.

(Letter of July 13, 1943 from Mr. Trainer addressed to Mr. Hogan with attached photostat was thereupon marked and received in evidence as Plaintiff's Exhibit No. 5.)

* * * * *

96 By Mr. Tumulty:

Q. Can you identify this letter? A. Yes, sir, it is a letter from Mr. Hogan to myself, acknowledging the receipt of the photostatic copy of the signatures of the M.E.B.A. members who objected to the advertisement in the magazine.

Mr. Tumulty: No objection?

Mr. Cook: No objection. What is the date of that letter?

Mr. Tumulty: This letter is dated July 14, 1943, addressed by Mr. Hogan to Mr. Trainer.

Mr. Cook: Do you wish to read it?

Mr. Tumulty: Yes, after it is marked.

(Letter of July 14, 1943 from Mr. Hogan to Mr. Trainer, was thereupon marked and received in evidence as Plaintiff's Exhibit No. 6.)

* * * * *

97 By Mr. Tumulty:

Q. Now, Mr. Trainer, can you tell us whether or not the Diesel Engineers International Association is a purely social and educational organization? A. No, sir, it is not.

Q. Where is it located? A. It is located in Jersey City.

Q. Is that in your territory? A. Certainly.

Q. Did you know about this organization at the time you wrote these letters? A. Yes, I knew about it since 1940.

Q. What are some of the things that this organization does from which you know it is not a purely social and educational organization? A. Its president, Fred Congdon, is a member of a rival union.

98 Q. Is a member of a rival union? A. Yes, he is a member of the International Longshoreman's Association. That is the first objection I have got to it.

The second objection is that it runs an employment agency and offers to supply marine engineers and to recruit marine engineers for the steamship owners.

Q. Any other reason? A. Well, it takes the stand that the craft or class involved is motor ship engineers only as against motor ship and steam engineers. That is important for us before Labor Board hearings.

Q. Will you explain that a little further? What craft or class does the M.E.B.A. represent? A. We represent the craft or class of licensed, chief, assistant and junior engineers on steam and motor vessels as a single craft.

Q. And what sort of engineers does this organization represent? A. This organization says that the motorship engineers are in a special craft by themselves.

Q. And if they are in a special class by themselves, would they be entitled to be represented by special representatives? A. They would be entitled to vote under

99

the National Labor Relations Act for motor ship engineers only.

Q. You felt it to be your duty to bring that matter to the attention of the president of the National Association? A. There is another reason, a very important reason. We are faced by six very strong and very powerful company unions. During the shortage of engineers, the companies involved could not get replacements from any place but the M.E.B.A. If they were to start up an International Diesel Engineers Union, that would supply these six powerful enemies of ours with replacements. Furthermore, it would break down the morale of our men to be opposed at all times to join in these rival organizations in any way.

Q. Now, as the result of your protest, what happened? A. Why, I got a letter back on July 17.

Q. Can you identify this letter? A. Yes, this is the letter I received.

Q. What is its date? A. It is dated July 17.

Q. By whom is it signed? A. It is signed by Mr. Blake, secretary-treasurer of the National Marine Engineers Beneficial Association.

Mr. Tumulty: Any objection?

Mr. Cook: That is the one that was marked at the pre-trial hearing?

100 Mr. Tumulty: Yes, it was marked at the pre-trial hearing.

Mr. Cook: We have no objection.

Mr. Tumulty: I offer this letter in evidence.

(Letter of July 17, 1943, from Mr. Blake to Mr. Trainer, was thereupon marked and received in evidence as Plaintiff's Exhibit No. 7.)

By Mr. Tumulty:

Q. Now, Mr. Trainer, in this letter Mr. Blake makes the following statement:

"You are not kidding anyone by trying to make the back door agreement that you made with the U. S. Lines Company on the JOHN ERICSSON stick."

Now, what did you understand was meant by the term "back door agreement"?

Mr. Cook: May it please the Court, before he answers that question, this is the letter upon which this whole suit is based. Since it has been offered in evidence, I think it should be read, the whole letter, and not just a paragraph.

The Court: Are you intending to read it?

Mr. Tumulty: Yes, I intend to read it, Your Honor, in proper order as we prepared our case. I do not think I am compelled to read it at any particular time.

The Court: It might be a little easier. You simply want to ascribe a meaning to that term at the present moment?

101 Mr. Tumulty: Yes, I would like the jury to know what the meaning of these words are when I read the letter to them.

The Court: Probably the jury would understand this letter if they had the background of the letter itself.

Mr. Tumulty: I have no objection to reading it at this time, Your Honor, if you prefer that we follow that order.

The Court: I don't like to direct your order, if you have it mapped out, but I assume it will come in in due time, Mr. Cook.

Mr. Cook: What is that?

The Court: It will evidently come in in due time, and I won't disturb his order of presentation.

Mr. Cook: That is all right. I just wanted to be sure that he read the whole letter.

Mr. Tumulty: The letter will be read.

The Court: Very well, proceed.

Mr. Tumulty: Will you read the previous question that was not answered?

(Thereupon, the reporter read the pending question as follows:

"Q. Now, Mr. Trainer, in this letter Mr. Blake makes the following statement:

“‘You are not kidding anyone by trying to make the back door agreement that you made with the U. S. Lines Company on the JOHN ERICSSON stick.’

102 “‘Now, what did you understand was meant by the term ‘back door agreement’?’”)

The Witness: A “back door agreement” is a slang expression used among trade unions and it means that a secret, collusive agreement has been made between a union official and an employer whereby the employer gets a benefit or benefits against the interest of the union membership, and the union official gets a cash or other consideration for making the agreement.

It is a sell-out, a sell out of the membership.

By Mr. Tumulty:

Q. And you understood Mr. Blake’s letter to mean that you had made such an agreement with the U. S. Lines Company? A. Yes.

Q. Now, he says:

“‘You are not kidding anyone by trying to make such an agreement stick.’”

What do you understand he meant by that? A. That after making the agreement I was trying to defy the War Labor Board, that I was trying to defy an order of the War Labor Board and make this crooked agreement that I was supposed to have made in January stick even against the orders of the War Labor Board.

Q. Did you ever at any time make any agreement, verbal or written, directly or indirectly, with the U. S. Lines
103 with reference to the JOHN ERICSSON? A. No, sir.

Q. Or the KUNGSHOLM? A. No, sir.

Q. Did you ever make any back door agreement with any employer? A. No, sir.

Q. Did you do anything at any time to endeavor to make any such agreement, or anything that might be described

as such agreement stick? A. No, I did my best to pull those two gentlemen out of every pitfall they fell into.

Q. Did you do the best you could in your negotiations with the U. S. Lines Company to uphold the position of your union? A. Certainly.

Q. In your answer a moment ago, you said that you tried to pull those two gentlemen out of pitfalls. What did you mean by that? What two gentlemen were you referring to? A. I was talking about Blake and Hogan when they were negotiating with McCarthy for the U. S. Lines.

Q. Did they fall into some pitfalls? A. One after another. They first of all asked for less men than what the company was giving them. Hogan asked for four less and then Blake asked for two less.

104 Q. Did you correct that? A. I did, and they put the ship that was in class A-3 in the same class with the Gripsholm, in A-2, and in the meeting of July 27 they went in and made some terrible mistakes. They came in with an agreement that instead of talking about just raising the wages they talked about raising the overtime rate. They talked about supplanting the arbitration clause. They talked about making the termination date six months. And I said to Mr. Hogan when we went out, "He can fight you on any one of these issues that are immaterial, he can prolong the thing for a long time. They can even deny the War Labor Board jurisdiction over these questions."

Q. Did Mr. Hogan agree with you on that? A. Yes.

Q. Did he abandon those conditions? A. Certainly, and he went out straight for the wages as I suggested.

Q. In explaining the meaning of "back door agreement" you used the words "sell out." What did you mean by that? Sell out by whom? A. The union official sells his membership out to the employer for a consideration, cash or otherwise.

Q. In other words, it is a betrayal of his trust? A. Certainly.

Mr. Tumulty: If Your Honor please, I will now
105 read the letter to the jury.

The Court: All right.

* * * * *

110 Cross Examination

By Mr. Cook:

Q. Mr. Trainer, how long have you been a licensed engineer? A. Since 1918.

Q. What were you before that? A. I was a Junior.

Q. A junior engineer? A. Yes, sir.

Q. Licensed? A. Yes—no, not licensed; unlicensed.

Q. Prior to 1918 you were an unlicensed engineer? A. What is that?

Q. Prior to 1918 you were an unlicensed engineer? A. Yes.

Q. Did you ever serve as a fireman? A. Yes.

Q. As an oiler? A. Yes.

Q. For how many years in that capacity? A. Well, I served perhaps three or four years; maybe more.

Q. Considerably more? A. Yes, considerably more.

Q. When did you first take up the seafaring profession? A. I have worked off and on at the seafaring profession since 1908—1907.

Q. Where were you educated, Mr. Trainer? A. Common school.

Q. How many grades? A. Oh, I think it was five grades.

Q. And no further elementary education? A. No.

Q. What did you do when you left school? A. I went to work in a logging camp.

Q. Then you have been working ever since you left the fifth grade? A. Well, I have ben working ever since I left that.

Q. Mr. Trainer, when did you first become an officer of Local No. 33? A. 1924.

Q. What was that office? A. Special organizer.

Q. What were your duties as special organizer? A. To go out on the ships and talk the men into joining the union.

Q. To get their applications for membership? A. Yes.

Q. Did you get applications for membership? A. I did.

* * * * *

123 By Mr. Cook:

Q. You stated you negotiated a number of agreements with shipping companies— A. Yes.

Q. (Continuing) —covering wages and working conditions? A. Yes.

Q. How many agreements did you negotiate? A. 80.

Q. You signed all those yourself? A. Yes.

Q. And how many amendments? A. 200.

Q. Were any of those agreements or amendments
124 not in writing? A. No, sir. It is illegal to make a verbal agreement under the Wagner Act.

Q. Just answer the question. A. No.

Q. When you entered into a written agreement I think you testified that you must send a copy to the national office. A. Yes.

Q. Did you send a copy of each one of those 80 agreements and 200 amendments to the national office? A. Except in one where the vessel was torpedoed, but all others we sent.

Q. What vessel was that? A. That was the Carter Coal Company.

* * * * *

135 You spoke, Mr. Trainer, of this agreement with the U. S. Lines Company on the steamship JOHN ERICCSO. Did you carry on any of those negotiations? A. There never has been any agreement made for the JOHN ERICCSO.

Q. I asked you: Did you carry on any of the negotiations after July 1, 1942 on the JOHN ERICCSO? A. No, the two national officers carried on the negotiations.

Q. That is right. A. I didn't carry it on because there were too many cooks spoiling the broth.

Q. Mr. Hogan, the national President, and Mr. Blake, the National Secretary and Treasurer, carried on the negotiations; is that true? A. Yes, but attempts were made to carry on negotiations with me, and I refused.

Q. But you didn't negotiate that contract? A. There was no contract negotiated.

Q. You didn't attempt to negotiate any contract? A. No, sir.

Q. Did you ever appear before the Maritime War Emergency Board on that contract or that wage agreement? 136 A. No, sir, I was not even notified of the date of the hearing, so I couldn't.

Q. Did you ever appear before any Board representing your local to get a wage agreement on the JOHN ERICSSON? A. No, sir. I cooperated closely with the national officers and decided that just one man was going to do the negotiating. It is fatal to have more than one man do the negotiating, or three or four, with an employer.

* * * * *

142 Q. You defined a back door agreement yesterday.

Where did you get that definition? A. It is an old definition, but as late as December 3, an issue of the Pilot, that definition was brought up, where one union characterized another union as making a back-door agreement.

Q. What union was that? A. That was the National Maritime union.

Q. Accused another union of making a back-door agreement? A. Yes.

143 Q. And they ascribed to it the definition you have given? A. A little stronger.

Q. Have you any record to show? A. Yes.

Q. Have you it with you?

Is this where you get your definition, from the newspaper article? A. I had that definition, that definition is really an old one, but that is a reiteration of the definition.

Q. You didn't get it from the newspaper article, from the Pilot? A. That refreshed my recollection. The man who brought that into me was Byne.

Q. Where in that definition, in that newspaper, is there any intimation that it accuses someone of receiving a bribe or a cash consideration?

The Court: Do you want the witness to take the paper and show it?

Mr. Cook: I told him he may take the paper and testify from that, if he wishes.

The Court: Maybe counsel could point it out to him.

Mr. Tumulty: I could point it out to him. It is a long article.

The Court: It might save a little time. Just indicate to Mr. Cook or to the witness, either one.

The Witness: These are the words: "If it has not already been done, these officials should be paid handsomely by the ship owners for the betrayal of the merchant seamen. It is difficult to understand * * *". The rest goes on, and, of course, they refer to it as a "Sweetheart agreement".

The Court: Will you read that again? I didn't get it.

Mr. Cook: Will you read that again, louder?

The Court: Speak a little louder.

The Witness: Yes, sir. (Reading)

"If it has not already been done, these officials should be paid handsomely by the ship owners for the betrayal of the merchant seamen. It is difficult to understand how the ship owners, who claim to be interested in winning the war over Fascism can then align themselves in agreements secretly arrived at designed to sell out the seamen; particularly with organizations who have professed no interest whatever in winning the war."

Shall I read this?

By Mr. Cook:

Q. No, that is enough, but there is nothing in that article that accuses a man, in making a back-door agreement, of taking a bribe? A. It says if he hasn't been paid, he
145 should be paid.

Q. Paid handsomely? A. If he hasn't been. That is intimating—

Q. (Interposing) Have you ever used that phrase “back-door” in your experiences in labor circles? A. Why, yes, there is another which is often used, “back-door ship-ping”.

Q. Have you used it? A. I don't think—I would be careful about using it, very, very careful.

Q. Could you say for certain that you had never used it. A. I may have used it in a fit of annoyance, but I don't make that charge without it being substantiated.

Q. You may have made it. If you had made it, would you have given the same interpretation to it that you now give? A. In the fit of annoyance, yes.

Q. You would? A. Yes.

* * * * *

150 Q. Now, I want to bring you down to this advertisement that appeared in the trade journal for the Diesel Association. What size ad was that, do you remember? A. I would say it was probably an inch by 3 inches.

Q. It was half an inch by a column, as a matter of fact, wasn't it? A. I am not sure.

Q. How familiar are you with that Diesel Association? A. I am pretty familiar.

Q. Have you read its by-laws and constitution? A. I have.

Q. Do you know its president? A. I know of the president, Congdon.

Q. Are you on friendly terms with him. A. I am not on any terms with him. He is a member of the I.L.A., a rival union, and he is a member of this union, too.

Q. You are not friendly with him? A. I am not antagonistic, but the man is with Ryan and he is one of the
 151 worst enemies we have. He is in the International Longshoremen's Association and he fought us in the harbor.

Q. From a reading of its constitution and by-laws, do you believe it was a labor union? A. Yes, definitely.

Q. Do you know whether or not it has ever been recognized as a bargaining agent by the National Labor Relations Board? A. That isn't the question. It is a labor association, whether or not it has been recognized.

Q. Has it ever been recognized to your knowledge? A. I don't know, but it can be if it takes the right procedure.

Q. Do you know of your own knowledge whether it is ever entered into any agreements with shipping companies covering working conditions? A. It has not got the men yet. It is trying to get them.

Q. But it hasn't yet, has it? A. No.

Q. Doesn't it also include stationary engineers as well as engineers on vessels? A. Certainly, so does the International Union of Operating Engineers.

152 Q. Your union does not? A. Our union does not? Our union lets a man who is working stationary belong to the union. There are lots of men on the Great Lakes that are stationary engineers.

Q. When you protested against that advertisement to the National officers, it would solely on the ground that that was a labor union? A. Here is the trouble, Mr. Cook. Let me explain it.

In New York today we have got a certain number of company unions. There is the Standard of New Jersey, that is, the Esso Tankers Officers Association, there is the Standard of New York, the Socony Vacuum Tanker Officers Association. There is the Texas Tanker Officers Association. That is three company unions. There is the Tidewater Tanker Officers Association. There is the Deep Water Tanker Officers Association. That is six.

Then, there is the Caribbean and Gulf Licensed Association, which is the United Fruit, and there is the Brotherhood of Marine Employees, the Export Line. There are eight strong company unions. Maybe I haven't counted in some of them.

Q. They are company unions, though? A. Yes, in other words, they are unions whose membership is limited
153 to that of a single employer or company, whether they are employer dominated or not.

This organization of ours, in order to fight the company union, has a clause in its oath of obligation which says, "I will not belong to any association of Marine Engineers so long as I am a member of the national M.E.B.A."

Q. That is in your constitution? A. No, not in our constitution, but in the oath of obligation.

Q. You take that oath of obligation? A. Yes.

Q. Each member of your union? A. Yes. It is done for practical reason, to prevent him separating his loyalty and becoming confused and joining a company union. Don't you see, when an advertisement appears in the paper inviting him to weaken his morale and to join something that isn't the M.E.B.A., we have got to stop that if we ever hope to defeat the company unions that exist in New York.

Q. You think your members would violate their oath and join the Diesel Association? A. The Diesel Association is a formidable name to me, especially when a clause in it says that "We are organized for the mutual interest of employer and employee." 90 per cent of all the company unions have that in their constitution. That is poison.

154 Q. Would they violate that oath of obligation if they joined the Diesel Engineers Association? A. The men felt so. The big majority of the men felt so, and the advertisement was dropped in the next issue.

Q. This letter of protest that has been introduced in evidence, were all the persons who signed that protest members in good standing of Local 33? A. No, there was one man, Moeller, who belonged to No. 13. There is another

man, McNamara, I believe he belonged to the Gulf, and then there is another man who belonged to Baltimore who signs himself a member, but all of the rest were members in good standing in No. 33.

Q. Did you ask any of those members to sign that protest? A. After about six of them signed, they came to me first, and they said, "We object to this advertisement. We think it should be stopped."

I said, "Go out to the clerk and write down what you want to say, and Korb wrote down what they wanted to say, and about five of them signed it. I said, "Where are all the other fellows, that complained about this advertisement? Those who want to sign it, walk up and sign it. Those who don't, don't sign."

Q. But you did ask them to sign it? A. I said
155 those who want to sign.

* * * * *

Re-direct Examination

156 By Mr. Tumulty:

Q. Mr. Trainer, you were asked in your cross examination as to your education and you stated that you had left school after the fifth grade. Did you leave voluntarily of your own choice? A. No, sir.

Q. Why did you leave? A. Well, my father was drowned at sea when I was two years old and my mother died when I was four, and an uncle and an aunt raised me. When I reached the age where I got through the fifth grade my uncle said, "You are a big hulk of a boy now. It is time to you went to work." He said, "I am going to get you a Bull Cook's job with Steve Taylor and you will get ten dollars a month and your food."

Q. Did you have to acquire any special learning in order to become a marine engineer? A. Yes.

Q. How did you acquire that learning? A. I took a course in the International Correspondence Schools in Marine Engineering.

Q. Did you qualify as a marine engineer? A. Yes.

Q. Did you take an examination in order to qualify? A. Yes.

Q. Did you pass the examination? A. I have passed
157 five of them, yes. I got a chief steam license and chief motor.

Q. Have you read very many books, Mr. Trainer? A. Yes, I have read quite a few books.

Q. Can you state some of the books you have read. A. Of course, I have read the standard book, the Bible, and I have read Shakespeare, and then I have read Adam Smith's "Wealth of Nations" and Ricardo's "Principles of Political Economy." I have read a great deal of John Stuart Mill, only John Stuart Mill merely paraphrases Ricardo. I have read Buckle's "History of England", part of it. I have read all of Humes. I have read part of Gibbons' "Decline and Fall," and I have read, of course, Admiral Mahan.

Q. Who is he? A. He was one of the greatest thinkers of all times. He was the man who laid down what effect sea power had on history.

Q. Have you read any other books you can recall? A. I have read Ely's "Social and Legal Progress." During the French Revolution he shows the effect of the number of blast furnaces on the war with Napoleon.

Q. Are you interested in economic subjects? A. Yes.

Q. Have you made a special study of that? A. I
158 have taken it more of a hobby than anything else.

Q. Do you have a library? A. Yes.

Q. How many books do you have? A. I have 40 good books.

Q. Have you read them all? A. I have read them all, yes. Of course, the "Wealth of Nations," I have read that about seven times over. Ricardo's, I have read that about ten times.

* * * * *

160 Q. Can you identify this paper?

A. Yes, sir, it is the official weekly paper of the National Maritime Union.

Q. What is the National Maritime Union?

A. It is the largest union of unlicensed men of maritime workers in the United States, mostly engineers, oilers, and firemen, ordinary and able seamen and stewards.

Q. Engineers?

A. No engineers, no licensed engineers. Junior engineers, unlicensed.

Q. Can you state approximately how many members that union has?

A. Now they claim to have 60,000 men.

Q. Can you state whether that paper is widely read among maritime workers?

A. Yes, it is very widely read. They give this free to each one of their members.

Q. Will you give the date of that issue?

A. This is December 3, 1943, quite recently. It is called the Pilot. Maybe the record doesn't show that.

Q. The Pilot?

A. Yes, the Pilot.

Q. Have you examined that paper?

A. I have.

161 Q. Have you found in it a news article relating to a so-called back-door agreement?

A. Yes, sir.

Q. Will you please identify that particular article by the headlines?

A. "S. I. U. officials sign phony pact, try to break M C S—"

Q. What is the MCS?

A. Marine Cooks and Stewards on the West Coast—"and N M U conditions."

Q. Is there an editorial in the paper on that same subject?

A. Yes, sir.

Q. What is the headline?

A. The S. I. U., it says: "The lead story in the Pilot on the back-door agreement signed by the S. I. U.," that is how it begins.

Q. I draw your attention to a paragraph in the editorial and I request that you read that.

A. (Reading):

"This plot was naturally scotched and destroyed at the N M U Convention in 1939. Concrete evidence that these men were in the pay of the ship owners threw the spotlight on these characters who masqueraded as members 162 of the N M U. The Convention unanimously expelled these spies, among whom were Joe Volpian, Denarski and William McCuiston."

Q. That is an editorial concerning a back-door agreement that was made by certain labor unions in the year 1934, isn't that correct?

A. No, what they are talking about was made quite recently. It was made in 1943.

Q. But this editorial—

A. —refers to the expulsion of McCuiston and others, yes.

Q. On a previous occasion when another back-door agreement was entered into?

A. In 1934, yes.

Mr. Tumulty: I would like to offer this paper in evidence.

Mr. Cook: I have no objection.

The Court: Yes, I think it is in evidence, anyway. You both have read from it. It is in evidence as to those portions.

Mr. Tumulty: As to the meaning of the term "back-door agreement", and as to the particular editorial to which I have made reference.

The Court: I suggest you gentlemen get together and initial those parts, bracket them with your initials.

Mr. Tumulty: We will be glad to do that.

(The newspaper was marked and received in evidence as Plaintiff's Exhibit No. 8.)

• • • • •

163 By Mr. Tumulty:

Q. Can you identify this letter, Mr. Trainer?

A. Yes, this is a letter written, mimeographed and signed by myself.

Q. What is the subject of the letter?

A. The subject of the letter is in answer to Mr.
164 Blake's letter of July 17.

Q. And do you refer in that letter to the matter of the Diesel Engineers International Association?

A. I do.

Mr. Tumulty: I offer this letter in evidence.

The Court: Any objection.

Mr. Cook, No objection, if your Honor please, except that we will check it with the original.

The Court: Yes, that will be understood. That may be called out.

Mr. Cook: And substitute the original.

The Court: Yes.

Mr. Tumulty: This letter is dated July 27, 1943, sent by Mr. Trainer to Mr. Blake, and it is in reply to the letter Mr. Blake sent to Mr. Trainer, which I read to the jury yesterday.

(Mr. Tumulty read Plaintiff's Exhibit No. 8 to the jury.)

(Letter of July 27, 1943 from Mr. Trainer to Mr. Blake was thereupon marked and received in evidence as Plaintiff's Exhibit No. 9)

By Mr. Tumulty:

Q. Can you identify this document?

A. Yes, sir.

Q. What is it?

A. This is an application that the D. E. I. A. gives
165 to all their initiated members.

Q. Is this Exhibit A referred to in your letter which I have just read?

A. Yes, it is.

Mr. Tumulty: I offer this in evidence.

Mr. Cook: Just a moment, may I see these exhibits as you offer them.

Mr. Tumulty: Yes. I would like to offer these as a part of the same exhibit.

The Court: They are referred to in the letter?

Mr. Tumulty: They are referred to in the letter and they are attached to the letter.

(The D.E.I.A. application was thereupon marked and received as Plaintiff's Exhibit 9-A.)

By Mr. Tumulty:

Q. Will you please describe that paper?

A. This is a call or a notice from the D.E.I.A. officials to its junior members to go to the U. S. Maritime Training Service to get a license, a marine license.

Q. And was this paper attached as Exhibit B to your letter to Mr. Blake which I just read?

A. It was.

Mr. Tumulty: I offer this as Exhibit 9-B.

(The notice from the D.E.I.A. was thereupon marked and received in evidence as Plaintiff's Exhibit 9-B)

166 By Mr. Tumulty:

Q. Will you describe this paper?

A. This is a page from a bulletin issued by the United States Department of Labor. It is Bulletin No. 634 and it is entitled "Characteristics of Company Unions," published in 1935. It shows that a company union and a trade union are two separate and distinct things.

Q. And was this paper attached to your letter to Mr. Blake?

A. It was.

Mr. Tumulty: I offer this as Exhibit 9-C.

(The bulletin of the U. S. Department of Labor was thereupon marked and received in evidence as Plaintiff's Exhibit 9-C.)

* * * * *

169 *Interrogatories on Behalf of Plaintiff and Replies
to Interrogatories.*

Mr. Tumulty: If the Court will permit, I would like at this point to read certain interrogatories and the answers to the interrogatories which were served in this case.

The Court: Very well, have you got a copy of it?

Mr. Tumulty: Yes, I have got it.

The Court: Would you rather have one of your associates read the answers while you read the questions?

Mr. Tumulty: I would like to do that.

Ladies and gentlemen of the jury, in accordance with the federal rules of civil procedure, the plaintiff before the trial of this case served on defendant's attorney certain interrogatories, that is, questions which the defendant is compelled to answer under oath, pursuant to the rule, and I am going to read to you the interrogatories that I served as counsel for the plaintiff on Mr. Cook and Mr. Sothoron and the sworn replies of Mr. Blake given under the rule, and Mr. Rosenbloom is going to read the answers and I will read the questions.

"Q 1. State whether or not you dictated to another person the letter dated July 17, 1943 containing the statement
170 quoted in paragraph 9 of the complaint (hereinafter
sometimes referred to as the 'July 17th letter') and,
if so, state the name and address of such person
and the exact place where you dictated the said letter.

"A The letter dated July 17, 1943 was dictated to my secretary, Miss Rosalie H. Austin, 1717 G Street N. W., Washington, D. C., in my office, Room 315, Machinists' Building, 9th and Mt. Vernon Place, N. W., Washington 1, D. C.

"Q 2. State the exact place from which you mailed the July 17th letter, or caused the same to be mailed.

"A The July 17th letter was mailed in the mail box on the first floor of the Machinists' Building, 9th and Mt. Vernon Place, N. W., Washington 1, D. C.

"Q 3. State whether or not you caused copies of the July 17th letter to be made and, if so, whether such copies were typewritten or mimeographed. State the names and addresses of the person or persons you caused to make such copies and the exact place or places where such copies were made.

"A Copies of this letter were mimeographed and the stencil was cut by my secretary, as indicated in No. 1, and copies made here in the national headquarters office, Room 315, Machinists' Building, 9th and Mt. Vernon Place, N. W., Washington 1, D. C.

"Q 4. State whether or not you caused copies of 171 the July 17th letter to be mailed, delivered or shown to persons other than the plaintiff and if so, state the names and addresses of all such persons, and the exact place or places where such mailing, delivery or showing took place. State whether or not any of said persons were members of Marine Engineers Beneficial Association No. 33 or affiliated associations and if so, state the name or names of such persons and of the association of which they were members.

"A Copies of this letter were mailed to the Convention Representatives and the Secretaries and Business Managers of the Subordinate Associations and members signatory to the protest as furnished by the plaintiff to President Hogan in letter of July 13, 1943, who are all members of this Association, * * * "

Mr. Tumulty: Your Honor, I would like to interrupt at this point. The balance of this sentence is not responsive to the question that I asked and I would like to move that it be stricken.

The Court: Have you any objection?

Mr. Rosenbloom: Would your Honor care to see it? I have encircled it.

Mr. Cook: If your Honor please, I think it is responsive to the question and I think it is very relevant to the question?

172 The Court: Will Mr. Blake be a witness?

Mr. Cook: Oh, yes, your Honor.

The Court: Mr. Tumulty, it would undoubtedly be a proper question to ask him explanatory of his answer.

Mr. Tumulty: Yes, your Honor, I believe they could ask him that question.

The Court: Yes, I think so. I will leave it in that way, if you prefer, or strike it now with the understanding that he shall have the right to explain it when he takes the stand.

Mr. Cook: I think, your Honor, that it is responsive to the question.

The Court: It is explanatory of his reason. It goes to the matter of malice and the reasons.

Mr. Tumulty: If it is understood he will be placed on the stand and we will have an opportunity to cross examine him on that statement, I am willing to let it stay and we will read it.

Mr. Cook: We will put Mr. Blake on the stand.

Mr. Tumulty: Will you continue with the reading?

Mr. Rosenbloom: Shall I start from the beginning?

Mr. Tumulty: Perhaps you had better.

(The reading of the written interrogatories and answers of Mr. Blake was continued as follows:)

173 "A (4) Copies of this letter were mailed to the Convention Representatives and the Secretaries and Business Managers of the Subordinate Associations and members signatory to the protest as furnished by the plaintiff to President Hogan in letter of July 13, 1943, who are all members of this Association, and as this was official business sent out under the seal of the Association, such members are under obligation to consider such official business and communications as being applied to those who are members of this Association only and in good standing, and copies of this correspondence were sent only to those recorded as members and therefore bound by the rules of this Association.

"The names and addresses of members signatory to the protest are:

"Harold C. Bateman, No. 41, 2101 5th Street, Port Arthur, Texas;

"Quistein Solheim * * * "

The Court: Won't it simplify it to list the number of men, without reading them?

Mr. Tumulty: I would be willing to do that, your Honor.

Mr. Cook: Certainly.

The Court: How many are there?

Mr. Tumulty: Eighteen, I believe.

The Court: In different parts of the country?

174 Mr. Tumulty: Yes, your Honor.

Mr. Cook: 18.

Mr. Tumulty: 18 in different parts of the country.

The Court: Very well.

Mr. Tumulty: May we just read the different states?

The Court: Yes, if you wish.

Mr. Tumulty: Would you read the states? Don't duplicate them. If there is more than one in one state, don't duplicate them.

Mr. Rosenbloom: Port Arthur, Texas.

Mr. Tumulty: Just the states.

Mr. Rosenbloom: New York, New Jersey, Pennsylvania, Maryland, and Oregon.

Mr. Tumulty: Then, will you continue to read?

(The reading was resumed as follows:)

"A (4 Continued) The following were signatories to the protest of the advertisement and were indicated as members of the M.E.B.A. by Mr. Trainer, but our files showed no record of them and they were not furnished with copies: Colin W. Ingersoll, James P. Simpson, P. F. Belanger, P. J. Mulhern, John McNamara, Robert W. Mueller and A. L. Palmer.

"The following Convention Representatives were furnished copies of the correspondence:"

Mr. Tumulty: I believe there are 24 names. You
175 might check them.

Mr. Cook: 24, that is right.

Mr. Tumulty: 24 names. Will you name the states in which those 24 persons were listed?

Mr. Rosenbloom: Michigan, Illinois, Maryland, Virginia, Missouri, Louisiana, Pennsylvania, Alabama, Missouri, Pennsylvania, New York, Ohio, Washington—the State of Washington—Texas, Oregon, Massachusetts, Michigan, Wisconsin and California.

(The reading was resumed as follows:)

“A (4 continued) These letters were all mailed from the Machinists' Building mail box, first floor, 9th and Mt. Vernon Place, N. W., Washington 1, D. C.

“Q 5. State whether or not the names and addresses of the persons to whom copies of the July 17th letter were mailed or delivered were obtained from the records of the National Marine Engineers Beneficial Association, and if not, state the source from which such names and addresses were obtained.

“A All of the names and addresses of persons to whom copies of the July 17th letter were mailed were taken from the records of the M.E.B.A., which are the official records of the National Association as required to be reported by the Secretaries of the Subordinate Associations.

176 “Q 6. State whether or not to your knowledge, plaintiff has negotiated contracts on behalf of Marine Engineers Beneficial Association No. 33 or affiliated associations with shipping concerns in New York City and elsewhere and, if so, identify by date and names of parties thereto all such contracts of which you have knowledge.

“A I have no personal knowledge of any contracts negotiated by the plaintiff on behalf of the M.E.B.A. No. 33, or affiliated associations, with shipping concerns in New York City or elsewhere. The following, however, is a list of contracts apparently negotiated by the plaintiff, as taken

from the records and files of the National Marine Engineers Beneficial Association."

Mr. Tumulty: Your Honor, there are a number of those. Perhaps we could give the number.

The Court: I think so.

Mr. Tumulty: And show the period, the earliest and the latest date. Can you count them, please?

Mr. Rosenbloom: I count 80 on this list, 80 contracts. The first one listed is dated February 5, 1937, and the last one listed is March 5, 1943, and most of them are signed "For the N.M.E.B.A. by E. P. Trainer".

Mr. Tumulty: Will you read the balance of the answer?

(The reading was resumed as follows:)

177 "A 6 (continued) The defendant acquired knowledge prior to July 17, 1943 of the so-called 'back-door agreement' mentioned in paragraph 9 of the plaintiff's complaint."

Mr. Tumulty: And those answers are dated what date?

Mr. Rosenbloom: Dated November 8, 1943.

Mr. Tumulty: That concludes the reading of those interrogatories.

* * * * *

178 **James P. O'Kane** a witness called by the plaintiff

Direct Examination

By Mr. Tumulty:

Q. State your full name, please.

A. James P. O'Kane.

Q. Where do you reside?

A. 40 Clinton Street, Brooklyn.

Q. Are you an officer of No. 33, M.E.B.A.?

A. I am president.

Q. When did you become president?

A. Approximately about 1932.

Q. Prior to that date did you hold an office in the union?

A. I was vice president.

Q. When did you become vice president?

A. Approximately, about four years before that.

Q. And were you a member of M.E.B.A. prior to that time?

A. I was.

Q. When did you first become a member?

A. About 1902.

Q. You have been a member continuously since that time?

179 A. I have.

Q. Do you know the plaintiff, Mr. Trainer?

A. I do.

Q. Do you know the defendant, Mr. Blake?

A. I do.

Q. Now, did there come a time when you accompanied Mr. Trainer and Mr. Hogan to attend a conference with officials of the U. S. Lines Company in connection with the negotiation of an agreement for a contract covering the JOHN ERICSSON?

A. That is right.

Q. Do you recall the date of that meeting?

A. No, I do not.

Q. Would it refresh your recollection if I suggested that the meeting was held on July 27, 1942?

A. That is approximately right.

Q. And you attended that meeting with what other members of your union?

A. Mr. Trainer and Mr. Hogan.

Q. Who else was present?

A. Mr. McCarthy, his attorney, Mr. Hogan, Mr. Trainer, and myself.

Q. What was the purpose of the meeting?

A. They were trying to negotiate some kind of a contract.

Q. Was any claim made at that meeting by any representative of the U. S. Lines that the U. S. Lines had
180 already with Mr. Trainer covering the vessel?

A. There was not.

Q. Did any official of the U. S. Lines make the statement that that official or any other official of the U. S. Lines had talked to Mr. Trainer about the JOHN ERICSSON?

A. They did not.

Q. Did any officials state that they had made an agreement with Mr. Trainer regarding the KUNGSOLM?

A. They did not.

Q. Did they state that any official of the U. S. Lines Company had communicated with Mr. Trainer regarding the KUNGSOLM in January, 1942?

A. They did not.

Q. Or the JOHN ERICSON?

A. They did not.

Q. How long have you known Mr. Trainer?

A. Approximately 20 or 25 years.

Q. Have you heard him discussed in union circles? Have you heard men talk about him?

A. At various times, yes.

Q. Have you heard them talk about his character?

A. Yes, I have.

Q. Can you state of your personal knowledge what his reputation is among union members for honesty and integrity?

A. The highest that I ever heard.

181 Q. Did you ever hear the term "back door agreement" used in union circles?

A. I have.

Q. Did you hear it before this case was instituted?

A. I did.

Q. What is your understanding of the meaning of those words?

The Court: Do you mean as he has heard it discussed among other union men?

Mr. Tumulty: Let me preface that question, Your Honor.

By Mr. Tumulty:

Q. Did you receive a copy of the letter of July 17, 1942, which Mr. Blake sent to Mr. Trainer and circulated among the members of the union?

A. I did.

Q. From where did you receive it?

A. From Washington, D. C.

Q. Did you read it?

A. I did.

Q. Did you note in the letter the reference to a back door agreement?

A. I did.

Q. When you received and read the letter, what did you understand was meant by that phrase?

A. I understood by that, meaning that Brother
182 Trainer was trying to pull something off unbeknownst to the members of No. 33.

Q. What do you mean by "pull something off"?

A. Pull something crooked.

Q. Have you any doubt in your mind about that?

A. Not in the least.

Q. Do you think other trade union men in maritime circles would understand it the same way?

A. Absolutely.

Mr. Tumulty: I have no further questions.

Mr. Cook: No questions.

By Mr. Tumulty:

Q. May I just clear one point? In my examination I didn't make it clear that they were trying to negotiate a contract for the JOHN ERICCCSON at the meeting of July 27th. Was it for the JOHN ERICCCSON?

A. I believe so, yes, for the JOHN ERICCCSON.

The Court: That will be all, I guess, Mr. O'Kane.

Mr. Tumulty: That is all.

(Discussion off the record.)

Mr. Tumulty: May I recall him for one further question?

The Court: Yes.

By Mr. Tumulty:

Q. If you and the members of your local believed that a
183 business agent had entered into a back door agreement, what would you do about it?

A. Do you want it in my own language?

Q. Yes.

A. Throw him out the window.

* * * * *

William J. Garrett a witness called by the plaintiff,

* * * * *

Direct Examination

By Mr. Tumulty

Q. State your full name.

A. William J. Garrett.

Q. Where do you reside?

A. 169 Colvin Avenue, Buffalo, New York.

Q. Are you a licensed marine engineer?

A. I am.

Q. Do you hold an office in any local of M.E.B.A.?

A. I hold an office in M.E.B.A. No. 1 of Buffalo, New York.

Q. For how long have you held that office?

A. Since 1918.

Q. Do you know Mr. Trainer?

184 A. I do.

Q. When did you first meet him?

A. Personally, I first met him I think along about 1936, something like that. I had inter-association correspondence with him previous to that time, around 1923 or 1924, something like that.

Q. After you met him personally in 1936, did you have occasion to meet him after that time very frequently?

A. At various times. Most generally at conventions of the association.

Q. National conventions?

A. National conventions.

Q. Do you know Mr. Blake, the defendant?

A. I do.

Q. Have you ever been a delegate to a national convention?

A. I have.

Q. And you have seen Mr. Trainer at conventions?

A. Yes, sir.

Q. Was he a delegate too?

A. Yes.

Q. Have you ever been a member of the National Executive Committee of the M.E.B.A.?

A. Have I been one?

185 Q. Have you ever been a member of it. A. Yes, sir.

Q. For how long were you a member? A. I think about from 1918 to 1941. One year in between there that I was not.

Q. What does the National Executive Committee do? A. What is its function?

Q. Yes. A. The National Executive Committee is elected, representatives from the different parts of the United States. We zone them off into different districts set up in the constitution to represent the different parts of the United States. The West Coast—

Q. (Interposing.) I don't want you to go into too much detail. A. There are five members elected to it.

Q. Do they supervise the affairs of the association? A. Yes, they are the Supreme Court during the interim of the convention, that is, they take care of all business.

Q. Did you receive a copy of Mr. Blake's letter to Mr. Trainer of July 17, 1942? A. I did.

Q. How did you receive it? A. Through the mail.

Q. From Washington? A. Yes, sir.

186 Q. About when did you receive it? A. I would imagine around the 20th, the 19th or 20th of July, some time. I didn't pay much attention to the date.

Q. Did you read the letter? A. I did.

Q. Did you note the sentence in it referring to a back door agreement made by Mr. Trainer? A. Particularly, yes.

Q. Prior to that time, had you heard the words "back door agreement" used? A. Yes, many times.

Q. What did you understand was meant by that? A. Back door agreement?

Q. Yes. A. Back door agreement, in the language of organization affairs, that is, general union affairs, is a phoney agreement that is made by an official without the approval

of the membership, that is, he takes it upon himself to violate his trust and make a bargain with the employer which we assume is to the advantage of the employer and to the credit of the representative who makes it; that is, it is generally assumed by everybody that hears about it and talks about it that he is a white-haired boy. He has sold out. He got something out of it either financially or some consideration otherwise, and it is just dynamite in union circles when that term is used.

187 Q. Is it one of the most serious charges that can be made against a union representative?

Mr. Cook: I object to the phrasing of that question.

The Court: Yes, it is leading.

Mr. Tumulty: I withdraw the question.

Mr. Cook: I have given counsel plenty of latitude, but we must have a limit.

The Court: He sees the error.

Mr. Tumulty: I am sorry.

By Mr. Tumulty:

Q. What did you understand by the statement in the letter that Mr. Trainer was trying to make the agreement stick? A. Having plenty of experience as the business manager of M.E.B.A. No. 1, occupying identically the same position as Mr. Trainer in No. 33 and having been elected many times to negotiate agreements, and knowing the atmosphere that would prevail if somebody had made a back door agreement, it would seem to me and everybody that knows anything about it that he would be in a very precarious position if he didn't try to make it stick after he made it with the employer, because, after all, if I can use the language--

Q. Use your own language. A. After all, if he was pieced out by the employer for putting out a phoney agreement, the employer has got him in the bag. If he doesn't
188 make it stick, he is between the devil and the deep sea, between the employer and the union. If he is guilty he would try to make the agreement stick. He would have to have the members accept it as he made it.

Q. Have you had the opportunity through contacts with other men in the union who know Mr. Trainer to form an opinion as to his reputation among union men? A. I had many occasions, especially since the war picture came in. Many times when we call in the deep sea men, when they come up to the Great Lakes to seek employment on ships up there, they naturally come in and present their credentials in our office, or any M.E.B.A. local office, and tell you who they are, what organization they are from, and generally quite a few of them come in from Local 33. When they come in, we talk about Mr. Trainer.

Q. What is your opinion, as a result of those discussions? A. Every one I talked to hold the highest regard for him. They have the greatest respect for him. They claim that he did the best job in '33 that has been done in a great many years.

Q. Can you state of your own knowledge whether agreements that Mr. Trainer negotiates in New York affect the wages, hours and working conditions of members of other unions? A. Well, here is the way they would affect it: nobody in any local port or any port or any section of
189 the country is duty bound to just ship under agreements in that locality.

If I carry a card in the M.E.B.A. or any other union, I expect all the privileges of the national organization, no matter what town I am in, so long as I carry a good standing card.

That likewise would apply to any of the agreements that are set up, if we make them on the Great Lakes, if somebody comes up there and says, "I would like to ship out on the Great Lakes," we have those agreements up there, and if he shows you a good standing card in the M.E.B.A., whether it is from New York, Philadelphia, Boston, or on the west coast, he can enjoy the privileges of those agreements that we made up there and the same thing applies other places.

Q. In other words, if a vessel from New York needs an engineer at Boston or any other port and an M.E.B.A.

member would sign on that agreement under the contract that was negotiated by Mr. Trainer? A. That is correct.

Q. Have you ever heard any one other than Mr. Blake accuse Mr. Trainer of making a back door agreement? A. No, sir.

Mr. Tumulty: I have no further questions.

Mr. Cook: No questions.

* * * * *

190 Mr. Tumulty: If the Court please, under date of June 17, 1943, Mr. Blake wrote a letter to Mr. R. Merriweather, the business manager of M.E.B.A. No. 97, in San Francisco, in which he referred to Mr. Trainer.

I called upon the counsel for the defendant, for an admission as to whether such a letter had been written, and furnished them a copy of it, and they responded that they did admit that the letter had been written, and with the Court's permission, and without objection, I would like to offer this copy of letter in evidence.

Mr. Cook: We agree to admit it without formal proof, subject to any objection as to its materiality.

The Court: Do you offer any objection?

Mr. Cook: I don't recall the wording right now.

Mr. Tumulty: Would you like to see it?

Mr. Cook: May I see it?

(Counsel for plaintiff hands document to counsel for defendant.)

Mr. Cook: I have no objection.

The Court: Very well, it will be received.

(The letter referred to was marked Plaintiff's Exhibit 10 and received in evidence.)

(Whereupon, Plaintiff's Exhibit 10, heretofore received in evidence, was read to the jury by Mr. Tumulty.)

191 Mr. Tumulty: I have a deposition, your Honor, of the witness Moe Byne, whose deposition was taken on January 18, 1944, in Washington, D. C.

The Court: Very well. I suppose the original is here, is it?

Mr. Tumulty: Yes.

The Court: Won't you take a moment and explain to the jury that you are reading from a deposition, in place of having the witness present?

Mr. Tumulty: Ladies and gentlemen of the jury, under the Federal rules in civil procedure, if it appears advisable to do so, because a witness may not be available for the trial, or for other reasons, it is permitted that counsel may secure the attendance of the witness and then take his deposition by asking him questions, which are answered under oath, in the presence of both attorneys, and the attorney for the defendant has the opportunity of cross examining the witness, and that was done in this case, in the case of Mr. Moe Byne, who is one of the witnesses for the plaintiff, but who is unavailable at this time.

The attorney for the defendant waived any objection to the taking of the deposition.

(Whereupon, the deposition taken on January 18, 1944, of **Moe Byne**, a witness for the plaintiff, was read to the jury by Mr. Tumulty.)

192 (On page 5 of said deposition of Moe Byne, the following question was asked, and partial answer given:

"Q. Do you know the meaning of those words? A. Well, the meaning of these words, that is, in trade unions that I belonged to, when an official—"

Whereupon, the following objection was made:

"Mr. Sothoron: I make the objection that this witness can testify as to what his understanding of the term is, but I object to his interpreting what somebody else may understand by the term, because obviously, I might say, he is not an expert on languages, or at least he hasn't so indicated.")

The Court: I think if presumably the purpose of the question is to show its meaning among the trade membership that it would be appropriate to show it.

Objection overruled.

Mr. Sothoron: Very well.

(On page 13, of said deposition of Moe Byne, the following question was asked, to which objection was made:

“Q. Did it occur to you they would be sued for libel for making libelous statements using that expression?

“Mr. Tumulty: I object to that question. He is not a lawyer.”)

The Court: Objection sustained.

193 (On page 19, of said deposition of Moe Byne, the following partial question was asked, to which objection was made:

“Q. And that was a back door agreement. Does the term ‘back door agreement’ also imply, as was the case in the instance—

“Mr. Sothoron: Just a moment. I don’t like for you to be putting the words in your own witness mouth. Ask him any way you want to, but please don’t do that.”)

The Court: The question is leading. Did you put another question?

Mr. Tumulty: Yes.

* * * * *

Moe Byne a witness called by counsel for Plaintiff.

Direct Examination

12 By Mr. Tumulty:

Q. Will you state your name? A. My name is Moe Byne.

Q. What is your address, Mr. Byne? A. My address now is 414 West 13th Street, New York City.

Q. What is your occupation? A. Marine engineer.

Q. Are you a member of any union? A. I am now a member of Marine Engineers Beneficial Association Local 33.

Q. Are you employed at the present time? A. Right now, no, I am unemployed.

Q. Will you be available to testify as a witness at the trial of this case? A. I don't think so because I intend to ship out probably this week to go to sea.

Q. How long have you followed the profession of
13 marine engineer? A. My first license was a year ago in December.

Q. Prior to that time, what was your occupation? A. I went to sea from 1919 until 1936.

Q. In what capacity? A. As oiler, fireman, water tender. From 1936 to 1938 I was a Union official.

Q. Of what Union were you an official during that period? A. International Seaman's Union from 1936 to the spring of 1937. From 1937 to 1938 it was then called the National Maritime Union, to August 1938. From August 1938, since then, I have been going to sea regularly up to the present date.

Q. What office did you hold in the National Maritime Union? A. I held the office of the treasurer.

Q. Treasurer? A. Treasurer of the National Maritime Union.

Q. Will you explain how you were designated to that office? A. I was selected on a ballot in the International Seaman's Union in 1936, and we then later formed the National Maritime Union in the spring of 1937. We held a
14 convention that summer and the convention designated all our officials to serve office until the next coming elections, until the ballot.

Q. How many members were there in the National Maritime Union at the time you were treasurer? A. Well, I would say from 45,000 to 50,000 members.

Q. Were you active in Union affairs prior to 1936? A. Well, yes, some, in the I.S.U. I was quite active.

Q. When did you first become a Union member, that is, a member of any Union? A. I first became a Union member in 1919, when I first started going to sea; that is, the International Seaman's Union, I was a member of that Union until 1922. The Union about that time was about, well, I wouldn't say dissolved, but it was practically, you

know, broken to pieces, I would say. There wasn't much left of that Union. And I rejoined that Union again in 1931.

Q. And then you were— A. Then I stayed in the I.S.U. until the spring of 1937.

Q. When did you become a member of the M.E.B.A. No. 33? A. I became a member of the M.E.B.A.—I think I have got the exact date here. (Witness refers to paper.) I became a member November 8, 1943.

Q. Do you know Mr. Edward P. Trainer, the plaintiff in this case? A. Yes, I have known Mr. Trainer since 1936.

15 Q. Now, as the result of your activity in Union affairs and your acquaintance with Union members, are you familiar with the slang expressions generally and commonly used among Union men? A. Yes, I am.

Q. Did you ever hear the expression "back door agreement" used in Union circles? A. Yes.

Q. Do you know the meaning of those words? A. Well, the meaning of these words, that is, in the trade unions that I belonged to, when an official—

Mr. Sothoron: May I make an objection for the purpose of the record? I don't like to delay the taking of the deposition.

Mr. Tumulty: All right.

Mr. Sothoron: I make the objection that this witness can testify as to what his understanding of the term is, but I object to his interpreting what somebody else may understand by the term, because obviously, I might say, he is not an expert on languages, or at least he hasn't so indicated.

Mr. Tumulty: Will you go ahead. Would you want to read the question?

(The reporter read the question and the uncompleted answer as above recorded.)

16 A. (Continuing) —when an official is being accused of signing a contract in favor of the ship owners and I would say detrimental to its membership; in other words, selling out its membership to the ship own-

ers, that is the phrase that is used in the Unions, of a back door agreement.

By Mr. Tumulty:

Q. Have you ever had anything to do with the negotiation of Union agreements? A. I have, yes.

Q. What part have you had to play in connection with the negotiation of agreements? A. I have sat in, we always sat in negotiating committees, and I was one of the members of the committees of negotiations for the National Maritime Union. I have also signed contracts for the National Maritime Union when I was an official.

Q. So that you are thoroughly acquainted with the duties and the obligations of an officer of a Union who is charged with the negotiation of contracts? A. Yes, I am, fully.

Q. Will you state what those duties are? A. Well, each and every Union has a constitution that clearly outlines the duties of a Union official. I can go on and fill up pages as far as that goes with the duties, but the main duty of a Union official is to represent its own membership.

17 Q. Is it a position of trust and confidence? A. It is a position of trust and confidence, yes.

Q. And does a back door agreement imply or mean that there has been a violation of trust and confidence on the part of the Union official? A. Yes.

Q. Now, have you ever heard that expression used by other Union men in connection with any Union matters? A. Yes, I have heard that expression used in the International Seaman's Union when the officials were being accused of selling out its membership. Those days that term was used by the majority of the membership in that Union.

Q. You used the expression "selling out." Selling out whom? A. Selling out its membership.

Q. To whom? A. To the opposite party, which happens to be the steamship owners.

Q. Is there any doubt in your mind that that is what that phrase means not only to you but to Union members generally? A. Yes, that is my opinion that is what it means, all right, that "back door" phrase.

Q. Do you have any doubt about that? A. There is no doubt in my mind about that.

Q. Can you state it as a fact that that is so? A. Well, that is the phrase that is being used. That is being
18 | used in the trade unions. That is, I would say, a sell out.

Q. It is synonymous with "sell out"? A. That is right, back door agreement.

Q. Are you familiar with the opinion which is held in Union circles, that is, Maritime Union circles, regarding the reputation of Mr. Edward P. Trainer, his honesty and loyalty to the Union? A. I found him to be a pretty honest and sincere official of the Unions, what I know of him from 1936, and also I have spoken to quite a few members, in the years past, of the M.E.B.A. Union, because we have been on the ships. There are members of the M.E.B.A. and I would say the unlicensed men, which are members of the N.M.U. and the ones I have had contact with have had the highest respect for Mr. Trainer.

The N.M.U. is the Union that has the unlicensed men aboard the ship, like able-bodied seamen, and so forth.

* * * * *

193 | **Carl M. Madsen**, a witness called on behalf of the Plaintiff.

Direct Examination

By Mr. Tumulty:

Q. Will you state your full name? A. Carl M. Madsen.

Q. Where do you reside? Where is your home? A. 311
West 23rd, New York.

Q. What is your occupation? A. Marine engineer.

Q. What is your rank as a marine engineer? A.
194 | Chief engineer, steam and Diesel.

Q. Steam and Diesel? A. Yes.

Q. Are you a member of M.E.B.A. 33? A. Yes, sir.

Q. How long have you been a member? A. 32 years.

Q. 32 years? A. Yes.

Q. Do you know Mr. Trainer, the plaintiff? A. Yes.

Q. Do you know Mr. Blake, the defendant? A. Yes.

Q. Addressing yourself to January of 1942, did there come a time when you were employed by the United States Lines Company? A. Yes.

Q. As an engineer on the KUNGSHOLM? A. Right.

Q. Will you state the circumstances of how you became employed? A. On the sixth of January Mr. Wilson called me up and asked me would I care to staff chief on the KUNGSHOLM.

Q. Did he refer to the vessel as the JOHN ERICSSON?

A. No, he said the KUNGSHOLM.

195 Q. As a result of that telephone call what did you do? A. I said, "Yes." He says, "O.K., come down in the morning."

I went down there in the morning and I went right on board ship.

Q. Which ship was that? A. The KUNGSHOLM.

Q. Did you see the name on the vessel? A. No, I don't believe I did; it was too cold.

Q. You understood it was the KUNGSHOLM? You understood you were getting on board the KUNGSHOLM? A. Yes.

Q. Did you sign the articles and ship on the vessel? A. Yes.

Q. Did you communicate with Mr. Trainer in any way prior to the time the vessel left New York? A. No.

Q. Did you see any representative of M.E.B.A. 33 on the vessel at that time? A. No.

Q. What was the vessel used for? A. Army transport.

Q. Troops? A. Troops, yes.

196 Q. When did she leave New York? A. The 21st day of January I am pretty sure.

Q. After she left New York where did she proceed? A. Through the Panama Canal to Australia.

Q. Through the Canal to Australia? A. Right.

Q. Did she disembark troops at Australia? A. Yes.

Q. Then where did she go? A. New Caledonia.

Q. Did she disembark troops at New Caledonia? A. Yes, 3,000.

Q. And from there where did she go? A. San Francisco.

Q. When did she arrive in San Francisco? A. On the sixth day of April, 1942.

Q. When did you first learn the vessel's name had been changed from the KUNGSHOLM to the JOHN ERICSSON? A. Well, I learned that officially some time out at sea, but I had heard rumors that she was going to be renamed.

Q. That she was going to be renamed? A. But when, I didn't know.

Q. But you didn't know it officially until she was at sea? A. No.

* * * * *

197 Cross Examination

By Mr. Cook:

Q. Mr. Madsen, at the time you went on the KUNGSHOLM, in New York, and sailed on, you say January 21, was this vessel flying the American Flag? A. I was there already on the 21st; I was there on the 7th.

Q. I say at the time you sailed from New York Harbor was it flying the American Flag? A. Yes, sir.

Q. When you went on board on January 7th did you sign shipping articles? A. No; I think two or three days later.

Q. You did sign shipping articles, did you not? A. Yes.

Q. Was there anything in those shipping articles to show whether this was a foreign owned vessel or a United States vessel? A. No; she was not signed on by the Commissioner.

Q. Was there anything in the articles to indicate to you whether it was a United States vessel? A. I don't know; I didn't look.

Q. What is that? A. I didn't inquire.

Q. You didn't inquire whether it was a United States vessel or not? A. No.

Q. What wages did you receive as chief engineer on that vessel? A. I think it was \$300 a month.

Q. \$300 a month? A. Yes.

Q. Who determined what wage you were about to receive? A. Mr. Wilson.

Q. He told you what wage you would receive? A. Yes.

Q. And that was satisfactory to you? A. Yes.

Q. Did he state under what agreement, if any, you were sailing? A. No, he didn't mention nothing about an agreement.

Q. Did he mention to you that she was sailing under the Panamanian Flag? A. No.

Q. Did he mention that she was sailing under the United States Flag? A. No; but all the engineers were to be Americans.

Q. You would know, would you not, Mr. Madsen, whether or not this was a United States vessel at the time you sailed?

A. I think she was.

199 Q. You think it was? A. Yes.

Q. If it hadn't been you would have made inquiry, wouldn't you? A. Yes.

Q. Was there any name painted on the vessel at the time she sailed from New York Harbor? A. No.

Q. As a matter of fact, being a troop ship there wouldn't be any name? A. It was still the KUNGSHOLM.

Q. There wouldn't be any name on it, would there? A. No.

* * * * *

Re-direct Examination

By Mr. Tumulty:

Q. Mr. Madsen, after you signed on the vessel and learned that she was to be a troop ship were you given any instructions as to keeping your mouth closed about that ship and what she was going to do and what the plans were? A. No, but that is an understood thing.

Q. You didn't have to be instructed about that, did you? A. No.

200 Q. Did you violate those instructions? A. No, sir.

* * * * *

Harry M. Davis, a witness on behalf of the plaintiff.

Direct Examination

By Mr. Tumulty:

Q. Will you state your full name, Mr. Davis? A. Harry M. Davis.

Q. Where do you reside? A. 206 White Lake Place, Brooklyn.

Q. Are you a licensed marine engineer? A. Yes, sir.

Q. What rank? A. Second assistant.

Q. How long have you been a licensed engineer. A. Three years.

Q. Before that were you in the maritime service? A. Yes.

Q. What were you doing? What was your job? A. I worked my way up from fireman all the way up to 201 junior engineer and then to licensed engineer.

Q. How long have you been in the maritime service altogether? A. About seven or eight years.

Q. Are you a member of M.E.B.A.? A. Yes.

Q. For how long have you been? A. Three years.

Q. No. 33? A. No. 33.

Q. Will you please address your attention to early in January, 1942, January 3rd, to be exact; can you recall what your employment was at that time, what you were doing at that time? A. I was night engineer on one of the U. S. Lines boats.

Q. What boat was that? A. THE AMERICAN MANUFACTURER.

Q. The AMERICAN MANUFACTURER? A. Yes.

Q. What class boat was that? A. That is a Class C-2 boat, a new boat that has been built.

Q. A new boat? A. Yes.

Q. How long did you remain on the AMERICAN 202 MANUFACTURER? A. Three nights.

Q. What caused you to leave the vessel? A. The chief engineer told me I would have to report to Mr. Wilson the following morning.

Q. Who is Mr. Wilson? A. Mr. Wilson is the assistant port engineer for the U. S. Lines.

Q. Assistant port engineer? A. Yes.

Q. What is his job? A. To replace men on the vessels and to uphold the maintenance of the repair work.

Q. Had you known him before? A. Yes, sir.

Q. And he sent for you? A. Yes, sir.

Q. When you went to see him what were you instructed to do? A. I got over there about 11 o'clock the following morning and he told me he was going to put me over on the KUNGSHOLM and to get over to the boat right away.

Q. Did he tell you the boat was going to sail very promptly? A. Yes.

Q. Did he tell you to get your things packed? A. Yes; he told me on my way over to Brooklyn to pack up my clothes and get out to the boat, that they were signing on that day.

Q. What did you do? A. I went home and packed my bag and went down to the boat.

Q. Where was the boat? A. At Pier 4, Army Base.

Q. When you got on the vessel did you know what name the vessel bore? A. I knew it was the KUNGSHOLM.

Q. Had you ever heard of the JOHN ERICSSON up to that time? A. No, sir.

Q. Did you sign the articles? A. Yes, sir.

Q. Did you see the name of the vessel on the articles? A. No, sir; I didn't see the name of the vessel.

Q. Did anybody tell you the vessel's name was going to be changed at the time you signed on? A. No, sir.

Q. When did you first learn that the vessel was going to be named JOHN ERICSSON? A. I believe it was about two or three days out at sea.

Q. You heard the testimony of Mr. Madsen as to the fact that the vessel was used as a troop ship and that she sailed through the Panama Canal to Australia and from there to New Caledonia, and from there returned to San Francisco arriving in April of 1942? A. That is right.

Q. Is that correct? A. That is right.

Q. While the vessel was in New York did you see Mr. Trainer or any other representative of No. 33 on the vessel? A. No; nobody down at the vessel at the time.

Q. What were they doing at the vessel while she was waiting? A. They were converting her into a troop ship.

Q. Were you under censorship while you were on the ship? A. Yes, sir.

Q. Until what time? A. We were under censorship until we arrived back in San Francisco.

Q. In writing letters, or anything like that, could you state the name of the vessel you were on? A. That would be a thing you wouldn't be allowed to put in a letter, the name of the vessel or its destination.

Q. After the vessel got back to San Francisco in April, 1942, did some question arise about the wages being
205 paid the men? A. Yes; there was a question that did come up about wages there.

Q. What happened in that connection? A. We went up to Local 97 and had a few words up there and they told us that they would contact with the New York office, with Local 33, to see what agreement had been made for that vessel.

Later on we were advised by Mr. Merriweather that there was no agreement made, and that we should sail on the boat and by the time we came back that there would be an agreement drawn up for us.

Q. There would be an agreement drawn up for you by the time the vessel got back? A. Yes.

Q. And would that agreement go back to take care of the voyage you were leaving on? A. Yes, sir.

Q. Was the vessel being prepared to sail again after she had arrived in San Francisco? A. Yes.

Q. What were they doing to her? A. Overhauling the main engines.

Q. Did you sail with the vessel again after this dispute was settled? A. Yes, I did.

206 Q. The dispute didn't hold up the vessel? A. No, sir, it did not.

Q. When did you sail? A. We sailed June 16.

Q. Where did you go? A. Went to New Zealand, to Wellington, New Zealand.

Q. Did you have a cargo or troops? A. We had troops aboard.

Q. From New Zealand where did you go? A. Came back through the Panama Canal and then into New York.

Q. New York? A. Yes.

Q. When did she arrive in New York? A. August 19.

Q. Of what year? A. Of 1942.

Q. August what? A. August 19, 1942.

Q. So that during the period from January 21, which was the day she left New York— A. (Interposing) Yes.

Q. (Continuing) —until August 26, 1942, the vessel never put into port in New York? A. No, sir.

* * * * *

207 Cross Examination

By Mr. Cook:

Q. What was your title? A. Third assistant.

Q. What was your pay? A. \$175 a month plus 25 per cent emergency increase.

Q. Who fixed those wages? A. My wages were already marked on the articles.

Q. On the shipping articles? A. On the shipping articles, yes, sir.

Q. You don't know who fixed those wages, do you? A. No, I don't know who fixed them.

Q. Did you notice in signing the shipping articles whether it was a United States vessel or not? A. No, I did not.

Q. You would have known before you signed the shipping articles that it was not a United States vessel, would you not? A. The way everything was rushed at that time—I was the last engineer who signed on. We carried 12 engineers on that boat.

Q. If it had been a foreign vessel you would have known it? A. Yes, I imagine so.

Q. Did you notice whether it flew the American
208 Flag? A. It didn't until after we left port.

Q. But after you left port it flew the American Flag? A. After we left port it flew the American Flag.

* * * * *

209 Mr. Tumulty: I have a few questions, Your Honor, which I would like to read from the deposition of Mr. Blake taken before trial, the questions and the answers.

The Court: Very well.

Mr. Tumulty: This is an extract from a deposition of Mr. Blake before trial when he was examined in my office in the presence of his attorney. This is on page 4 of the deposition.

(Whereupon parts of the deposition taken on November 16, 1943, of **James H. Blake**, a witness for the plaintiff, was read to the jury by Mr. Tumulty, as follows:

“Q. Well, then, you are thoroughly familiar with the functions and duties of a business agent of a local of your association? A. I think I am, yes, sir.

“Q. Now, you say that in connection with your duties as business agent you negotiated contracts with employers. A. Yes, sir.

210 “Q. And in those negotiations you represented what interests? A. The licensed marine officers,
* * * ”

Mr. Cook: May it please the Court, before he proceeds any further, this is a deposition taken of the defendant before trial. The defendant is here and he has an opportunity to cross examine him and may use that deposition to contradict him if he wishes.

I certainly object to him using the deposition when the witness is present.

The Court: I think he may use it as admissions of the defendant, as admissions of the party. I presume that is the purpose of it?

Mr. Tumulty: That is the purpose of it, Your Honor.

The Court: I think it comes within the rule. You, of course, will have an opportunity, assuming Mr. Blake goes

on the stand, of making any further explanation which may be pertinent, but I do think as the basis of an admission he has a right to offer it.

(Mr. Tumulty proceeded with the reading as follows:)

“Q. Now, you say that in connection with your duties as business agent you negotiated contracts with employers.

A. Yes, sir.

“Q. And in those negotiations you represented what interests? A. The licensed marine officers that were
211 employed by the companies.

“Q. Would you say that the office of a business agent is a position of trust and responsibility? A. Very much so.

“Q. Is it necessary for the business agent to possess the confidence and trust of the members of his union. A. I would think so, yes, sir.

“Q. In order to be an effective business agent? A. Yes, sir.

“Q. They look to the business agent to protect their interests in his negotiations with the employers? A. Yes, sir.

“Q. If the members of a local believed that he was serving the interests of the employer rather than their interests, what effect would that have on his standing with the members of the union as their business agent? A. Well, the chances are they would not like it. Of course the trouble of it is that men engaged in this business do not get a chance to contact their locals very often. That is, their locals only hold a meeting say once a month or twice a month, and these fellows maybe only get into port maybe once in six months, and that may happen to be during the
212 period when there is not any meeting, and they just do not get a chance to contact their local.

“Q. They do hold meetings, however. A. Oh, they do, yes, sir.

“Q. And discuss matters affecting their interests? A. Yes, sir.

“Q. Does the business agent attend those meetings? A. As a rule, yes, sir.

"Q. Is he regarded as more or less an advisor of the members of the union on matters affecting their interests? A. Well, he acts in that capacity.

"Q. In other words, they are busy, and in their duties as engineers, and the business agent looks after their economic interests in connection with their relationship with their employer. A. Yes, sir.

"Q. Subject, however, to their meeting from time to time together to discuss the matters of interest to them. A. Yes, sir."

* * * * *

"Q. Will you state the extent of the jurisdiction of Local No. 33? I mean what territory does that local cover?")

Mr. Sothoron: Pardon me, what page are you
213 reading from now?

Mr. Tumulty: Page 12.

Mr. Sothoron: Oh.

Mr. Tumulty: "A. Well, of course, that territory, that is just locally, would cover probably the Port of New York, and you might just say the surroundings around New York, because there is locals at Philadelphia and Boston, Massachusetts. But really, due to the fact that there is a large amount of shipping that has their main offices in New York, and of course the New York office negotiates agreements with those companies, then they practically operate all over the world, you might say." Page 28:

"Q. Isn't it a fact that labor unions are frequently developed from social and educational organizations in their inception? A. Well, of course all labor unions have to start some place.

"Q. Frequently they started—as a matter of history they started in social organizations.

"A. Our own Association started out as a social organization."

That is all, Your Honor.

The plaintiff rests.

* * * * *

Mr. Cook: May it please the Court, at this time I would like to have an opportunity to move for a directed verdict in this case .

The Court: What is your ground?

Mr. Cook: The first ground is that this statement can not be construed to be defamatory in any sense.

The second is that it is a statement made by one labor official to another and, as such, it is qualifiedly privileged and is not actionable unless express malice is shown, and that there has been no showing of express malice.

My third point would be that the language used in the letter can not be construed to be libelous per se. If it is not libelous per se, the plaintiff must allege and prove special damage, which he has not done.

The Court: I will let the jury go out and we will give you opportunity to argue it briefly.

* * * * *

215 Mr. Cook: May it please the Court, we wish at this time on behalf of the defendant to move for a directed verdict at the close of the plaintiff's case on the ground, first, that the words used "back door agreement," in this letter of July 17, 1942, were not defamatory.

In the second place, being addressed from one labor official to another, they were qualifiedly privileged and being so, express malice must be shown on the part of the defendant, and we say that it has not been so shown.

Thirdly, the words themselves are not libelous per se, and not being libelous per se, plaintiff must not only allege but prove special damage arising from the use of these words, which he has not attempted to do.

The Court: I will hear you on the last two grounds.

I think as to the first ground, namely, the words are not libelous, I think there is evidence here tending to show that they have a special meaning among members of this union and, if that is so, it is not conclusive, but it does raise

an issue on that question, so I will hear you on the last two questions.

Mr. Cook: As to the question of qualified privilege, in *Caldwell v. Hayden*, 42 App. 166, 169, the plaintiff sued the defendant, the president of a local labor union, for uttering the following words:

“Brother Caldwell sits in his parlor in the quiet
216 solitude and sanctity of his home, and frames up a contract which is altogether contrary to the rules of this organization, and has the audacity to bring it here and try to palm it off on the members of this local as a bona fide contract.”

The Court of Appeals held that these words were not actionable on the ground, without going into the language of the Court unless your Honor wishes me to, “plaintiff, by virtue of his membership in the union, and assuming to serve it, was subject to reasonable criticism in respect of the work performed for the union, and the presumption is that the statement was made under these circumstances without malice and for the good of the order, unless the contrary can be inferred reasonably from the language itself.”

“It was within the power of the trial judge to determine as a preliminary question, whether defendant’s words would reasonably admit of the meaning ascribed to them in the innuendo, and, if satisfied that the words without that meaning are not actionable, it was his duty to prevent further proceedings.”

We are of the opinion that the language is not capable of the meaning ascribed to it by plaintiff in his declaration, and is not therefore actionable.

The Court: What was the meaning ascribed to it?

Mr. Cook: That he was—

217 The Court: You see, that is hardly in point, Mr. Cook. I have already ruled that the meaning ascribed to this, that there is proof tending to establish it.

Mr. Cook: They tried in the innuendo to infer that this was a crime of forgery and the Court held that the words used were not actionable and failed to impute to plaintiff the commission of the crime of forgery.

The Court: Certainly there is no doubt in my mind that there is evidence tending to show here that the term "back door agreement" implies an act of dishonesty and betrayal by the official who makes it against the members of his body.

If that is so, it does charge a dishonorable act and of a serious nature, and it seems to me that there is no privilege to make that charge unless there is some foundation for it, even to members of the Union. There is no privilege to make a false statement of a derogatory nature unless it is predicated upon some reasonable ground, is there?

Mr. Cook: I think there was sufficient evidence to show here that there was some ground of justification for that statement, that statement of itself did not impute a crime or any offense involving moral turpitude.

The Court: There is some evidence which would tend to justify, at best it would create an issue as to whether there was a reasonable or plausible ground for imparting such information to members of the union. It is not an
218 absolute privilege.

Mr. Cook: No, it is a qualified privilege.

The Court: A qualified privilege and must be in good faith.

Mr. Cook: That is right.

The Court: And which, of course, necessarily implies that there is a reasonable ground to support it, not necessarily that it is true, but that such a statement drawn from facts which a person of reasonable care and caution would be justified in making to the members in their own interest and for their own benefit.

Mr. Cook: Let me invite your attention to a Court ruling on what I think is a leading case, of *Berman v. Power Publishing Company*, 93 Colorado, 92 A.L.R., and accompanied

by a very voluminous note. In that case a labor newspaper published an article denouncing as disloyal members of the union who left the union shop and went to work for a non-union company. They called them "traitors," and said they were ordered to report to a union meeting at which they would be expelled, and the article went on to say that they were three of the most despicable rats that were ever a member of the labor organization.

The Court held in that case that that language was qualifiedly privileged, that there was some justification for it, that the trade paper only went to labor union members who were interested, and that therefore it was not libelous, and I think that reflects the law.

I say that is accompanied by a very voluminous note.

The Court: What Court was that?

Mr. Cook: Colorado.

The Court: I don't think I could follow the Colorado Court in that.

Mr. Cook: I think that in connection with the Court of Appeals case, Caldwell versus Hayden, I think this is a qualified privilege, and I think the Court can say there was justification for using the language which was used, that on the face of it—

The Court: What evidence is there so far of the justification?

Mr. Cook: The basis for the allegation that he entered into a back door agreement was that the plaintiff, or his organization, Local No. 33, permitted the engineers to ship on the KUNGSOLM or JOHN ERICSSON, as it was later named, or had previously been named, we don't know, under some kind of an agreement. No one knew what that agreement was. It was not an agreement in writing, but Wilson of the U. S. Lines merely called these men to report on the ship at \$175 is one, and certain other wage scales.

The Court: Is there any evidence that the defendant knew of that or approved it or was a party to it?

220 Mr. Cook: You mean the plaintiff?

The Court: Yes.

Mr. Cook: No, there is no evidence so far that he knew of it, but there is evidence that his local knew of it, that Local 33 knew of it, and he was in absolute charge of the local.

The Court: Of course, the charge itself here is a specific charge against him that he made a back door agreement; isn't that correct?

Mr. Cook: That is correct.

The Court: If you are correct, at best it would simply create an issue of fact which would have to be decided by the jury.

Mr. Cook: The other question, the words themselves, of course, are not libelous per se, not imputing a crime or offense involving moral turpitude or relating to misconduct in a man's business, trade, or profession, it can not affect that trade, business, or profession.

Under the ruling in Pollard v. Lyon, the Supreme Court says they do not come within those classifications. They are not libelous per se.

Reading the words in and of themselves, without the innuendo, by no stretch of the imagination can these words be held without the innuendo or without any testimony to be libelous per se.

221 The Court: What is that case?

Mr. Cook: Pollard v. Lyon, in 91 U. S.

The Court: Please get that.

Mr. Cook: If Your Honor please, I have quite a trial brief here with all these cases briefed and the decisions of the Courts quoted from.

The Court: Read me, please, from that.

Mr. Cook: I have a copy here.

The Court: Read me what the Court says about that, please. I understand, of course, that rule, Mr. Cook, but I am a little surprised to hear you say that the words of themselves without any particular meaning ascribed to them must be of a nature charging either some crime or some

act of dishonesty. I didn't know that was so. In this case that you have, is that true?

Mr. Cook: I want to check before I make that statement, Your Honor.

Mr. Tumulty: If Your Honor please, the sole purpose of the innuendo is because this was a slang expression and presumably the meaning might not be known to the Court or to the jury without explanation, but the words in themselves were libelous in the understanding which they had of people that this libel was directed to and it was inevitable that it would injure him in his profession.

In Consolidated Terminal Corporation v. Drivers, 222 Chauffeurs and Helpers Local Union, 639, decided by this court, it was said that:

"Publication of false statement that employer engaged in manufacture and sale of products to public is unfair to organized labor, is 'libelous per se' and special damages are not required to be stated in action based on the false statements with any more particularity than the nature of the situation permits."

The Court: I don't think it is necessary, of course, but I will let counsel advise me if I am wrong. My understanding of the law is that a charge, if it such as to charge either a crime or an immoral or a dishonest act, it would be libelous per se, wouldn't it?

Mr. Cook: If it charged a crime or immoral act, that is right.

The Court: And, if so, special damages are not required to be shown.

Mr. Cook: Special damages are not required.

The Court: If you have a term used which among a class of people has that special meaning, isn't that exactly the same situation? If in a trade, let us say, in any given trade, there was some expression which has a well defined meaning within that class and that that term is applied to an individual, assuming its meaning among that class implies

223 dishonesty or the commission of a crime or immorality, doesn't it become libelous per se as to that class of people? Doesn't it have that definition among that class of people?

Mr. Cook: If it can be construed to mean the commission of a crime, I would agree with Your Honor, but not merely a dishonest act.

There has to be a crime or offense involving moral turpitude.

The Court: You mean or an act involving moral turpitude?

Mr. Cook: That is right.

The Court: Not an offense?

Mr. Cook: No.

The Court: I mean in a criminal sense.

Mr. Cook: No.

The Court: Wouldn't you think that to charge one with making a secret agreement for his own benefit and to the detriment of the union he represents is charging him with an immoral act?

Mr. Cook: No, I do not think so. That is just the point. That is just the point I make.

The Court: Why not?

Mr. Cook: Because at the most that can be said he made an agreement that was not authorized by the union or contrary to the wishes of the union, and the most that can be said of it from his testimony is that it would be construed to mean that somebody would gather that he
224 got some consideration from the other side for doing it. That doesn't charge the commission of a crime, because we said he entered into a back door agreement.

The Court: I thought you said it was not necessary to charge it.

Mr. Tumulty: It wasn't necessary.

Mr. Cook: An act of moral turpitude?

The Court: Why wouldn't it be an act involving moral turpitude to charge the business head of one of these unions,

local unions, that for a consideration to himself, an advantage to himself, he acted not in the interests of the membership but for his own personal gain?

Mr. Cook: Yes, but the language in this letter does not charge that.

The Court: But the testimony tends to show that that is the meaning which is ascribed to it among the labor people, among the members of the union and maritime people.

Mr. Cook: But I still don't think it involves moral turpitude, at the most.

The Court: That term has caused a lot of discussion in the books.

Mr. Cook: Of course, it says an offense involving moral turpitude, not just an act involving moral turpitude.

Mr. Tumulty: Your Honor, I don't think that is the right rule to apply in a libel case.

225 The Court: Mr. Cook, we will hear from Mr. Tumulty.

Mr. Tumulty: In the first place, on this motion, we must assume that the jury would find every fact we have put in proof to be proven, therefore, the jury would have to find that the words meant exactly what our witnesses said.

There is a ruling in the case of oral defamation that makes certain categories, including the commission of a crime involving moral turpitude, and several other categories. It is not limited solely to the commission of a crime. There are several others.

One of them is to impute a disease to a person, that a person has a disease, and another one is to impute that a person is not competent in his own profession or is dishonest in his profession.

Even in slander cases you don't have to allege special damage in that kind of a case and a fortiori.

In a libel case, where it is written and where it therefore has a more damaging and permanent form, it is not necessary, and it is settled that it is not necessary.

Pollard v. Lyon, I haven't seen the case, but my recollection is that it is a slander case, not a libel case. If you will consult that opinion, I am quite sure you will find that there are numerous categories set up, including a case where a libel would necessarily injure a man in his business or occupation. There is no question about it that—

226 The Court: You probably have studied our own local decisions, and I have in mind that they hold that something which charges one with a commission of a crime or a dishonest or immoral act, is libelous per se. Am I correct about that?

Mr. Tumulty: Yes, Your Honor, there is no question about it.

The Court: What case do I have in mind?

Mr. Tumulty: Washington Post Company v. O'Donnell said the above ad is a fraud, with respect to an ad of a dealer's advertisement.

Another case saying that the defendant published a statement that the plaintiff was cutting prices, there is no law against cutting prices. There was no allegation of special damage. That was held to be actionable per se.

In Myerson v. Hurlburt—

The Court: You say he is charged with cutting prices. I can not see how that would be actionable per se.

Mr. Tumulty: Because, Your Honor, it cut him off from his source of supply.

In other words, people wouldn't sell goods to him to resell. It hurt him in his business. He was in the business of buying garage supplies and reselling them. The Court said because his suppliers would not supply him because they believed he was selling under their list prices, that would be damaging to him in his business, trade, or
227 profession, and that was libelous.

The Court: I see.

Mr. Tumulty: In Newell on "Slander and Libel," at page 155, the author says:

“Defamatory words falsely spoken or written of a person which imputes to him unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment, are actionable in themselves without proof of special damage.”

The evidence is clear that the only means of livelihood that Mr. Trainer had at the present time and has had for the past twenty years is this position which he holds, and he comes up for re-election again this coming December.

If the men believe this, we have the testimony of Mr. O’Kane, they will throw him out the window. He is 58 years of age. He is too old to take up his old profession again.

The jury can not help but find, and we will have to assume they will find the facts as we have proven them, that it would hurt him in his profession.

These gentlemen, for the purposes of the motion, admit that the words mean what we say they mean. They are asking Your Honor to treat this motion as if they had no meaning except that he entered into an informal agreement. They do not even go that far. They merely
 228 allege some one communicated with some one at his office, not himself, and that he didn’t object. Even if he knew of it and didn’t object, the vessel was going to sail, was going to carry troops, and this was shortly after Pearl Harbor.

The fact that he didn’t say, “You can’t sail before we settle and negotiate an agreement,” wouldn’t impute that he had made a back door agreement. It would be outrageous to make such an imputation against a man on such nebulous facts, and that is all they were in this case.

There is another category under slander, even if it was not in writing, if the words tend to hold a man up to public hatred, contempt or ridicule. That is the second ground on which this is libelous per se.

Here is the situation: We have proven that this boat was hurriedly manned and dispatched with troops to Australia and New Caledonia, and the charge made is that Mr. Trainer, the trustee for those men, made a back door agreement by which he, for some gain of his own, robbed them of what they were entitled to for risking their lives.

If the men on that boat and other men in the union believe he did do that, there is no doubt about it that they would hold him in hatred and contempt, and on this motion Your Honor has to assume that the jury would so find.

I submit there is absolutely no basis for the direction of a verdict on this evidence.

229 Mr. Cook: May it please the Court, may I refer to that case?

The Court: Let me ask you another question, Mr. Tumulty, first.

On this matter of qualified privilege, your proof does show that this communication was only addressed to members of the union; that is correct, is it not?

Mr. Tumulty: That it was addressed to members of the union, yes, Your Honor.

The Court: Would it in the absence of express malice be an unprivileged communication?

Mr. Tumulty: In our opinion, Your Honor, it would. It is unprivileged in the absence of express malice. Privilege would only apply in the case where he was addressing them on a matter that was relative to a privileged occasion. We admit he had a perfect right to send a letter to the members of the union who protested against the ad and in that letter he had a right to tell them the reasons why he carried the advertisement, even though every word in it was false, he was privileged to do that, and then the question of malice would come up, but this was an entirely irrelevant slur against Mr. Trainer that had absolutely nothing to do with the subject matter of Mr. Trainer's letter.

Mr. Trainer wrote him and gave him the names of the men in order that he might write them and explain

230 why he carried the advertisement in the paper, and when he got the names from Mr. Trainer, instead of doing that, he coupled with that a kick below the belt, and our contention is that there is no privilege covering that because it was not relative to the subject matter.

If Your Honor disagrees with us on that, we contend that even if it was privileged, that there is evidence here of malice in the words themselves in the absence of probable cause and falsity of the charge, and that that is a question, even if there were only slight evidence, which would be entitled to go to the jury.

The Court: Such as the circumstances under which it was made?

Mr. Tumulty: The lack of probable cause, the lack of justification, the words themselves, the letter which he wrote a month before to Mr. Merriweather in which he stated a feeling toward the plaintiff, a personal feeling, as if he felt the plaintiff was out to get him, indicating that he was out to get the plaintiff before the plaintiff got him.

In other words, there was personal animus, and that is all malice is. It means ill-will.

The Court: That is express malice?

Mr. Tumulty: That is express malice, yes. We contend we were not required to prove express malice in this case, but we have proved it.

231 This was not a relevant matter to bring up in connection with this letter. This letter was not only sent to men who protested. It was sent to men who had never seen the advertisement. It was like a bolt out of the blue. It was circulated throughout the United States to all the organizations and presumably would be spread by the people to whom it was sent throughout the members of their particular locals.

The Court: All right.

Mr. Cook: I want to refer first to that case of Meyerson v. Hurlburt. I don't think counsel gave Your Honor the correct impression of it. That was in 68 Appeals 360. The

Court held that aspersions on the credit of a business man are defamatory, not merely saying he was cutting prices, but other aspersions directly on his credit.

The Court says:

“Since no special damages are alleged, the declaration is demurrable unless defendant’s words are actionable as slander per se. To be so actionable, spoken words must ‘import a charge that the party has been guilty of a criminal offense involving moral turpitude, or that the party is infected with a contagious distemper’, or they must be ‘prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade.’ Pollard v. Lyon, 91 U. S. 225, 227, 23 L. Ed. 308. The
232 question here is whether the words are prejudicial to plaintiff in his trade.”

“Pollard against Lyon—”

Mr. Tumulty: (Interposing.) That is slander. That is exactly the rule. Even if it were oral, we are entitled to go to the jury without special damage.

Mr. Cook: There has been not a word of any damage of any nature to the plaintiff in this case. He still holds the same position, he still draws the same salary, he has increased his membership. There is absolutely no damage shown here, much less any special damage.

The Court: Well, I will overrule the motion now. I will be considering it as we go on. You might renew it at the close of the evidence.

My present notion is that it should be overruled, so I will give it consideration.

Mr. Cook: All right, thank you.

Would Your Honor care to have this collection of cases?

The Court: Yes, you might leave it with me, if you will, please.

Mr. Tumulty: May we have leave to submit a memorandum, Your Honor?

The Court: I wouldn't bother with that, unless you have it prepared, Mr. Tumulty. You might just dot down any particular case or cases you wish me to see. That will be sufficient.

233 Mr. Tumulty: Thank you.

The Court: You really won't have an opportunity to submit it.

Mr. Tumulty: I imagine not.

The Court: If you will just jot down with pencil any cases you wish to refer to, I will be glad to look at it.

Mr. Tumulty: Your Honor, I have a collection of cases. Some of them are on other points. If I could mark those that I think are in point.

The Court: Yes, just check them off.

Mr. Tumulty: Thank you.

* * * * *

252

Deposition.

Alfred J. McCarthy, a witness produced on behalf of the Defendant.

* * * * *

253 Direct Examination

By Mr. Cook:

Q. Please state your full name? A. Alfred J. McCarthy.

Q. What is your occupation? A. Senior Vice-President, United States Lines.

Q. Did you hold that position in 1941-1942? A. 1942, yes. Previously I was vice-president.

Q. You are here in response to a subpoena duces tecum in this case. A. I am.

Q. Have you brought the papers and records with you? A. I don't know exactly what you require; but I brought what information I have in connection with that particular vessel.

Q. Mr. McCarthy, inviting your attention to December, 1941, when the Motor Vessel JOHN ERICSSON was turned over to your company, do you recall that? A. I do.

Q. At that time did you have any agreement with the No. 33 Marine Engineers' Beneficial Association as to wages or working conditions? A. Not on that particular ship. On other vessels of the company we had.

254 Q. You had, on other vessels? A. Yes.

Q. When that vessel was turned over to you, did you make any agreement with Local No. 33 as to wages or working conditions? A. No.

Q. Did you ever have any conversation with Mr. Trainer, or any other official of Local No. 33, respecting wages or working conditions? A. No, none whatsoever.

Q. Did you ever have any memorandum or letter indicating any wages or working conditions on that vessel? A. No; we never exchanged any memorandum at all.

Q. You have no books, records or papers that would show any agreement as to wages or working conditions on that vessel? A. Not on that vessel.

Q. Do you know of your own knowledge if any officer or employee of your company had any conversation with Mr. Trainer about wages or working conditions on that vessel? A. I do not.

* * * * *

258 Mr. Cook: We have agreed, if your Honor please, that part of an answer to a question shall be read in evidence, and have agreed that this part of the answer was in answer to a question respecting wages on the steamship JOHN ERICSSON, and that portion of the answer is as follows:

A. I know that the vessel was taken over in a hurry, and we had to get around. There was no time to discuss wages with anybody. It happened over the holidays. We had to put some scale into effect, and we put what we thought was a fair and reasonable scale, based on the size of the vessel.

Q. Mr. McCarthy, have you any records, or do you know what vessels were operated by your company in 1941-1942?

A. Do you mean our own vessels?

Q. No, those being operated by you, either your
259 own vessels or— A. I would have to get all those
particulars. I could not tell you. We operated a
large number of vessels, and they are being added to daily.

Q. I mean during 1941-1942, you have no records with
you? A. I have no records showing the number of vessels
being operated.

Q. And you could not tell, from your own knowledge? A.
No.

Mr. Cook: Your witness, Mr. Tumulty.

Cross Examination

By Mr. Tumulty:

Q. Mr. McCarthy, you negotiated the agreement of No-
vember, 1941 which fixed the wage scale for engineer officers
on Class C vessels? A. I did.

Mr. Cook: Will you put the exact date of that in?

Mr. Tumulty: November 25, 1941.

Q. Was the function of negotiating collective bargaining
agreements your responsibility? A. As a result of an elec-
tion held, the M.E.B.A. Local 33 was appointed collective
bargaining agent, and we sat down and negotiated an
agreement.

Q. Your duties as Vice-President of the United
260 States Lines included the negotiation of such agree-
ments? A. I negotiated all labor agreements.

Q. You negotiated all labor agreements for the United
States Lines: were you the only officer authorized to nego-
tiate such agreements? A. I am.

Q. You are and you were at that time? A. That is right.

Q. Now, what office did Mr. Lawrence occupy at that
time? A. General manager.

Q. He was the general manager. Was he authorized to
negotiate collective bargaining agreements for the com-
pany? A. No. He does not negotiate agreements.

Q. Prior to December 31, 1941, by whom was the M. V.
JOHN ERICCSOON owned? A. She was taken over by the
Government just at the time she was turned over to us.

Q. Prior to that time, who owned the vessel? A. Prior to that she was of the Swedish-American Line.

Q. Was she then known as the JOHN ERICSSON? A. No.

Q. What was her name at that time? A. KUNGS-HOLM.

Q. Was the Swedish-American Line an affiliate of
261 the United States Lines? A. No; in no way connected with it.

Q. The KUNGSHOLM was a much larger vessel, was she not, than the Class C vessels covered by the November 25, 1941, agreement? A. That is correct.

Q. You say that the Government took over the KUNGSHOLM from the Swedish-American Line in December of 1941? A. That is right.

Q. That was shortly after Pearl Harbor? A. Yes. It was at the end of December.

Q. At the end of December, 1941. Do you recall the date on which the vessel was turned over to the United States Lines for operation? A. It was New Years Eve that we were called in by the War Shipping Administration and told that they desired us to take over the operation of that vessel, they had just taken her over from the Swedish-American Lines.

Q. Was the War Shipping Administration in existence at that time? A. It was the Maritime Commission at that time.

Q. What were your instructions with reference to the KUNGSHOLM when she was assigned to you by the Maritime Commission? A. Our instructions were that this vessel had to be ready to sail in three days.

262 Q. For what purpose was she to be used? A. Military purposes.

Q. Are you free to say whether she was to be used as a troopship or not? A. I think that is common knowledge, that she was a troopship. That is what she was taken over for.

Q. Were you given any instructions as to maintaining secrecy with respect to the movements of that vessel? A. Naturally.

Q. What were those instructions, generally? A. We gave no information out with regard to sailings of vessels.

Q. When did the vessel sail from New York? A. I have not got any record of that here. A considerable time after that. The idea was to get her away promptly; as I say within three or four days. But certain things developed which made it impossible for her to get away at that time.

Q. Do you recall whether, when you took the vessel over, any of the crew of the vessel who formerly operated it came along with the vessel? A. There were a few.

Q. When did the vessel acquire the name JOHN ERICSSON? A. As soon as the Maritime Commission took her over, they renamed her.

263 Q. Are you certain that she was renamed JOHN ERICSSON before she sailed? A. Oh, yes.

Q. Are you absolutely sure of that? A. Yes.

Q. Isn't it a fact that she was not renamed the JOHN ERICSSON until she was under way? A. She never sailed as the KUNGSHOLM. She sailed as the JOHN ERICSSON.

Q. Was she named the JOHN ERICSSON on the 2nd of January, 1942? A. I cannot give you the date. I am not sure about it.

Q. Is there any way in which you can check that? A. The Maritime Commission could check that.

Q. There is no way that you could check that, and let us know? A. No. I could not tell you from the records when she was renamed. She was renamed by the Maritime Commission; not by us.

Q. But you are not absolutely sure on what date she was renamed? A. That is right.

Q. Do you know whether the name on the boat itself was changed before she sailed? A. Everything was changed on it. But they don't display names now on vessels.

264 All their documents would read "JOHN ERICC-
SON".

Q. Were you personally on the boat before she sailed?

A. Before she sailed?

Q. Yes. A. Do you mean just before she sailed?

Q. Yes. A. No, not just before she sailed.

Q. And you have no personal knowledge as to that? A. I was there when she was taken over.

Q. Did you see the name of the boat at that time? A. No.

Q. Then you have no personal knowledge as to when the name was actually changed? A. No.

* * * * *

Q. Can you state, Mr. McCarthy, whether it was the custom and practice of your office in negotiating agreements on behalf of the United States Lines, to embody such agreements in a writing, whenever an agreement was reached?
A. Always in writing.

* * * * *

265 *Deposition.*

Newbold T. Lawrence, a witness produced on behalf of the defendant.

* * * * *

By Mr. Cook:

Q. Please state your full name? A. Newbold T. Lawrence.

Q. What is your occupation? A. General manager, United States Lines.

Q. Did you occupy that position in 1941-1942? A. Yes, sir, I did.

Q. When was the motor vessel JOHN ERICCCSON turned over to the United States Lines? A. In January, 1942; as we said, it was New Year's night.

Q. The first of January or New Years Eve? A. New Years Eve, I mean to say.

Mr. Tumulty: December 31.

Q. That would be December 31, 1941? A. That would be December 31, 1941, yes, sir.

266 Q. At the time it was turned over to your company, did you have any wage scale or working conditions agreement with Local 33 of the Marine Engineers? A. Yes.

Q. Did it cover this vessel JOHN ERICCCSON? A. No.

Q. When the vessel was preparing to sail, or at any time between the time you took it over and the time it sailed from New York, did you have any conversation with Mr. Trainer respecting wages or working conditions. A. I don't remember any conversation at all.

Q. Do you recall any telephone conversation with Mr. Trainer? A. No.

Q. Did you ever notify Mr. Trainer, or any member of Local 33, that you were putting this wage scale into effect? A. Not that I remember; unless he asked me.

Q. Unless Mr. Trainer asked you? A. Yes.

Q. Do you remember talking to Mr. Trainer at all about the wage scale on the JOHN ERICCCSON? A. No, I don't.

Q. Do you remember talking to anyone in Local 33 about the wage scale on the JOHN ERICCCSON? A. No.

267 Q. Would you have put into effect this wage scale without notifying Local 33? A. Yes; possibly we would.

Q. If you had put in a wage scale that was not covered by any agreement, would not Local 33 object? A. I don't think so. Any objections would probably have come from the officers themselves aboard the ship, and we had no objections at all from them.

Q. The officers would not have signed on the ship if the wages had been contrary to some agreement you had with Local 33, would they? A. I don't suppose they would. I don't know what they would do.

Q. You know from your experience, do you not, that Marine Engineers will not sign on without the consent of

their local? A. No, I don't know what the arrangement is between marine engineers and the local.

Q. Can you state whether or not, if this wage scale had been contrary to some agreement then in effect, that Local 33 would have objected? A. They might, if there had been an agreement, but there was no agreement on the wage scale for the JOHN ERICSSON.

Q. But if there had been any violation of any agreement then in force, would not Local 33 have objected? A. 268 I suppose they would have, yes.

Mr. Cook: Your witness.

Cross Examination

By Mr. Tumulty:

Q. Mr. Lawrence, do you know what the destination of the vessel was after she left New York? A. Yes.

Q. Will you state that? A. She was going to the Pacific.

Q. Do you recall when she returned to New York? A. She returned to San Francisco after that voyage; then she proceeded to another Pacific port; and then she returned to New York after that. I don't just exactly remember the date when she got back to New York.

Q. You say she returned to San Francisco after the first voyage? A. Yes.

Q. Do you recall the date when she arrived; the approximate date when she arrived at San Francisco? A. No, I don't recall the date. In June, I think.

Q. In June of 1942? A. June, I think.

Q. So that the vessel was not in the Port of New York, to your knowledge from January of 1942 until at least 269 some time after June of 1942? A. I think that is correct.

Q. Isn't it a fact, Mr. Lawrence, that your company does not negotiate agreements for wage scales covering vessels that are under—that is, agreements with M.E.B.A. 33 covering vessels that are under foreign registry? A. Yes, that is correct.

Q. You do not? A. No, we do not make any agreements with M.E.B.A. regarding vessels under foreign flags.

Q. Your agreement of November 25, 1941, specifies that that relates to American flag vessels only? A. That is right.

Mr. Tumulty: I have no further questions.

Re-direct Examination

By Mr. Cook:

Q. The agreement of November 25, 1941 would not cover the JOHN ERICCSOON, would it? A. No.

Q. Because the JOHN ERICCSOON was of greater tonnage? A. That is right.

Q. You could have had a telephone conversation with Mr. Trainer and have forgotten it? A. That is possible.

Q. That being two years ago, you may not have remembered it? A. That is right.

Q. But you could possibly have had that conversation? A. I might have had, yes.

Mr. Cook: That is all.

Re-cross Examination

By Mr. Tumulty:

Q. If you had such a conversation, would you have a record of it? A. No.

Q. Isn't it likely that you would remember such a conversation if you did have one? A. I don't know whether it is likely or not.

Q. Isn't it a fact that there has been a controversy with respect to this entire matter since June of 1942, and that the matter was brought to your attention as early as January, 1942, that is the matter of a dispute regarding the wage scale? A. There has been a controversy, yes.

Q. That controversy has existed since June of 1942, to your knowledge? A. It has existed ever since she was out on the West Coast.

Q. Nevertheless, in spite of that fact, you have no recollection of ever having had any conversation with Mr. Trainer regarding it? A. I don't remember any particular conversation. I have a good many conversations with a good many people; and I don't remember them unless I happen to make a note of them, which I very seldom do.

* * * * *

275 **James H. Blake**, the defendant.

* * * * *

Direct Examination

Mr. Sothoron:

Q. Mr. Blake, for the purpose of the record will you give the reporter your full name, please, and your address. A. James H. Blake.

Q. And you are the defendant in this suit that is on trial? A. Yes, sir.

Q. What is your present occupation, Mr. Blake? A. Secretary-treasurer of the National Marine Engineers Beneficial Association.

Q. And how long have you been secretary-treasurer of the National Marine Engineers Beneficial Association? A. Since May 5, 1942.

Q. 1942? A. 1942, yes, sir.

Q. Prior to that time, Mr. Blake, by whom were you employed, and where? A. I was business agent for the association on the Great Lakes.

276 Q. And how long were you employed as business agent on the Great Lakes? A. About 8 years.

Q. I take it you mean the business agent of the Marine Engineers Beneficial Association? A. Yes, sir.

Q. Are you a marine engineer, Mr. Blake? A. Yes, sir.

Q. And did you ever actively follow that profession? A. Yes, sir.

Q. How long? A. As an engineer about 11 years.

Q. And how long have you been a member of the National Marine Engineers Beneficial Association? A. Since 1926.

Q. Were you a member of any labor organizations prior to that time? A. Yes, sir.

Q. What were they? A. Marine firemen.

Q. The organization to which you now belong I understand is affiliated with the Congress of Industrial Organizations. A. They are, yes, sir.

Q. Was it always affiliated with the Congress of
277 Industrial Organizations? A. No, I think they affiliated with the Congress of Industrial Organizations in 1937.

Q. Directing your attention, Mr. Blake, to the midsummer of 1942, did there come a time when there was a dispute out on the Pacific Coast in respect to the motor ship JOHN ERICSSON? A. There was, yes, sir.

Q. Will you tell the Court and jury, Mr. Blake, in your own way just how you became involved in this dispute on the JOHN ERICSSON? A. Approximately June 15, 1942 the marine manager of the War Shipping Administration called our office and said that there was trouble in San Francisco over the engineers refusing to sign on the motor ship JOHN ERICSSON, so our national president, Mr. Hogan, called the San Francisco representative to find out what the trouble was, and our San Francisco man told him that—

Q. (Interposing.) Who was the man in San Francisco? A. Mr. R. Merriweather.

Q. Proceed. A. He is the business agent representing the association for the Port of San Francisco.

He stated that the wages which had been set on this vessel were below the prevailing wage, and that the men had refused to sign on. Evidently the boat had been in drydock for extensive repairs, and when it came time to sign
278 up the crew they just couldn't get engineers who would go aboard the boat and sign on for the wages that were being paid.

That was the story we received from him.

Mr. Hogan called Mr. Trainer, who—

Mr. Tumulty: If Your Honor please, is the witness testifying from personal knowledge?

Are you testifying from personal knowledge or from hearsay?

The Witness: Personal knowledge.

Mr. Tumulty: Were you present when the telephone call was made?

The Witness: Yes, sir.

Mr. Tumulty: Thank you.

By Mr. Sothoron:

Q. Just as a caution, Mr. Blake, confine it to your personal knowledge so there will be no question. A. I will. But in all these matters in regard to telephone conversations, we have double telephones in our office and I usually listen in on matters of this kind, so I not only was there but I was listening in on the conversation and I know what took place.

Mr. Hogan called Mr. Trainer to find out what the story was about these wages, and Mr. Trainer informed Mr. Hogan that the wages had been established for that boat and that Merriweather was simply trying to create trouble for him.

279 That was the story that we got from Mr. Trainer, and all this time the War Shipping Administration kept calling the National office; the military authorities kept calling the National office and said this boat was loaded with troops and ammunition to go into the Australian campaign and that the boat must sail; there couldn't be any delay over this question of wages.

We were unable at the time to determine just what the trouble was, but we did succeed in arriving at an agreement with Captain Devlin, who was acting as marine superintendent for the War Shipping Administration, that the War Shipping Administration would enter into negotiations with our National office for the purpose of finding out

what the proper wage was for this boat, with the distinct understanding that whatever wage was arrived at would be retroactive to the day that these men signed on for that current voyage.

With that understanding we again communicated with Mr. Merriweather, and in a very short time he called back and said he had interviewed the engineers and they were willing to sign on on those conditions.

The boat left on time; there was no delay, and the matter then become a matter of negotiations between the War Shipping Administration and the National office to establish these wages.

The War Shipping Administration instructed us to
280 first take this matter up with their agents, which was the United States Lines Company, operators of the boat, and we again contacted Mr. Merriweather to find out more in detail what the engineers expected, and from the story we got from him they not only expected a change in the wage rate but they expected a change in working conditions.

So Mr. Hogan and I prepared what we thought to be a proposal to submit to the company as an amendment to the existing agreement which would cover the things that these men were asking for.

We drew that up on July 4, 1942. We worked all day in the office on it, Mr. Hogan and I, and that night we mailed this proposal, a copy of it, to Mr. Trainer and Mr. Merriweather and to Captain Devlin of the War Shipping Administration with instructions to read it over and review it, and to let us know if they had any suggestions for changes or making further amendments.

Mr. Hogan also wrote the company and asked for an appointment for the purpose of submitting to the company a proposal covering the things which these men asked for.

In the meantime the War Shipping Administration pointed out to Mr. Hogan and myself that there was a bona fide collective bargaining agreement in existence which

covered everything practically, with the exception of wages.

They were willing to agree that it was proper to
 281 adjust the wages for this ship, because when the agreement was made with the company the agreement was only made to cover smaller type vessels, and even the agreement that was made with the company didn't follow the customary form of agreements whereby boats were classified according to their size and horsepower.

They had boats of several different classes, and evidently the company and the representatives of the association who executed the agreement had agreed to group those ships into one class for the purpose of setting up a wage scale, and in the agreement, therefore, the language that was mutually agreed to was that the boats presently operated by the company shall be known as Class C vessels, while the classifications would put them into about three different groups.

The JOHN ERICSSON was a boat so much larger than any of them that even the company admitted—in fact they put in this wage scale which is considerably above the scale which was called for in their agreement covering the boats which they mutually agreed would be known as Class C.

So, following the advice of the War Shipping Administration, before any proposal was made to the company—official proposal—Mr. Hogan and I decided that this first proposal which we had sent to Mr. Merriweather and to Mr. Trainer, and to the War Shipping Administration, that we would have to stop it because we couldn't ask for any change
 in the working conditions, because that was covered
 282 in the existing agreement.

So then an amendment was drawn up by Mr. Hogan and myself and presented to the company which only contained what our contention was that the wages should be on this motor vessel.

A meeting was arranged with Mr. McCarthy, the acting vice president of the United States Lines and Mr. Hogan. Mr. Hogan—

Mr. Tumulty: Pardon the interruption. Could we have the date of that meeting?

Mr. Sothoron: Yes.

By Mr. Sothoron:

Q. What was the date of that meeting, if you remember?

A. I think it was July 17; approximately July 17.

Q. Of 1942? A. 1942.

Q. 1943? A. 1942; and Mr. Hogan went to New York for the purpose of meeting Mr. McCarthy to keep this appointment.

When he walked into the office, Mr. McCarthy's office, he found Mr. Trainer there—

Mr. Tumulty: Were you present at the conference?

The Witness: No, I wasn't present.

Mr. Tumulty: I submit he can't testify as to what took place there.

By Mr. Sothoron:

283 Q. Leave out the incident of what took place in the office, which was not in your presence.

Did there come a time after this conference, about which you heard, when you received a letter from Mr. McCarthy, vice president of the United States Lines, or the National received a letter? A. The National office received a letter from Mr. McCarthy.

Mr. Sothoron: If Your Honor please, here is a file that was brought down under subpoena duces tecum by the plaintiff, which contains the letter.

Mr. Tumulty: Your Honor, this letter is dated November 6, 1942, which is several months after the conference, and it appears that there were letters intervening between this letter and the conference.

I think it wouldn't give a fair picture to just pick out one letter and put that in.

Mr. Sothoron: The file is here, and you may pick out anything you want.

For the purpose of this particular point, I would like to have this letter in, if Your Honor please. It shows the reason why Mr. Blake did certain things, which I think the jury is entitled to know about. It justifies, and tends to justify, his line of conduct.

The Court: I might suggest if it is explanatory
284 of his reasons for writing this letter, and making this reference to the plaintiff, perhaps it would be admissible as tending to show certainly a lack of actual knowledge. Wouldn't it have a bearing on that?

Mr. Sothoron: Very definitely so, Your Honor.

The Court: I merely suggest that. I haven't seen the letter; you gentlemen can judge, but I simply throw that out as a possible reason for its admissibility.

Mr. Tumulty: Then I withdraw my objection, if it is offered for that purpose only.

Mr. Sothoron: Thank you.

The Court: Do I understand, to bring things up to date, you have a letter here now of November, 1942?

Mr. Sothoron: November 6, 1942.

The Court: The last reference was back in July to this meeting. This matter continued all through?

Mr. Sothoron: That is correct.

The Court: Until November, when this letter was written?

Mr. Sothoron: That is correct.

By Mr. Sothoron:

Q. Are you familiar with Mr. McCarthy's signature?

A. Yes, sir.

Q. And that is his signature? A. That is his signature.

Q. And you have seen this letter? A. I have seen
285 this letter.

Q. And this is a file which is in the office of the National Marine Engineers Beneficial Association? A. Yes, sir.

Q. And this is a file which was brought down here pursuant to subpoena, by you? A. That is right.

Mr. Sothoron: I offer this letter, Mr. Tumulty, dated November 6, 1942, from the vice president of United States Lines, signed by Mr. McCarthy, addressed to Mr. Hogan, president of the National Marine Engineers Beneficial Association.

Mr. Tumulty: Your Honor, may we confer at the bench?

The Court: Yes.

(Whereupon, the following proceedings were had at the bench, and out of the hearing of the jury:)

Mr. Tumulty: If the Court please, the defendant took the deposition of Mr. McCarthy in New York, and on that occasion this letter was not shown to him and he was not questioned concerning it, and this appears to be an attempt to impeach his testimony given at that time, which was to the effect that there was no agreement or any communication by him or any other official, to his knowledge—

The Court: Let me ask you, just what is the purpose of this letter?

186 Mr. Sothoron: The purpose of this letter is to show that Mr. Blake contends that an action was predicated upon this statement, among others, from the United States Lines in respect to some kind of an understanding, in January, about the wage scale on the JOHN ERICSSON.

The Court: As I understand, you want this letter, and such other information as he had, to show that there were reasonable grounds for him to make the charge that an unwritten or secret agreement had been made between Mr. Trainer and the Company.

Mr. Sothoron: That is correct.

The Court: Involving these wage scales?

Mr. Sothoron: That is correct.

The Court: For the JOHN ERICSSON?

Mr. Sothoron: That is correct. In other words, he didn't write this letter out of thin air at all. He had, in his mind at least, abundant reason for believing that there was some,

kind of oral arrangement in regard to the wage scale on the JOHN ERICCCSON, in 1942.

The Court: What have you to say about that?

Mr. Tumulty: If Your Honor please, I believe that they are entitled to show good faith, provided they can establish the existence of a privileged occasion, and in the absence of a privileged occasion, I don't believe there is any right to show good faith, and there isn't any privilege
287 implied in law.

Furthermore, this statement does not support the inference—

The Court: Even though malice is implied, isn't actual malice an element to—in other words, I assume from what has gone before that you are making the claim and will make the claim to the jury that this was an actual feeling of malice on the part of the defendant actuating this reference to the plaintiff. Is that so?

Mr. Tumulty: That is correct, Your Honor.

The Court: If that is so, hasn't he got a right to show that there wasn't actual malice?

Mr. Tumulty: Your Honor, if it can be explained to the jury that this is not any evidence of the truth—

The Court: Of what?

Mr. Tumulty: That this is not any evidence of the truth, or which would tend to prove the truth of the charge, and solely for the purpose—

The Court: I don't think it is. This can only answer one purpose, and that is to show the information which the defendant had at the time he wrote the alleged libelous letter, as showing the information upon which he made the assertion, and as tending to prove good faith and a lack of actual malice.

Mr. Sothoron: That is the sole purpose of the
288 letter, Your Honor.

The Court: And that it is not evidence tending to prove the fact itself.

Mr. Cook: No, Your Honor, it is not offered for that purpose.

The Court: That you would necessarily have to have Mr. McCarthy, or someone from the office, to prove that.

Mr. Cook: It is not offered for that purpose.

The Court: I shall instruct the jury now, after the letter is read, so they will get its true significance.

Mr. Cook: Very well.

The Court: With that understanding you may read the letter.

* * * * *

290 The Court: Ladies and Gentlemen of the Jury, it is proper for me at this time to state to you the conditions upon which I have admitted this letter in evidence.

It makes certain statements of fact with reference to Mr. Trainer, and others, and with reference to these wage scales and conditions of employment of engineers on this ship, the JOHN ERICCCSON.

291 It is not admitted as any evidence of proof of those facts. The reason for that is this:

The only proper evidence of that would be the sworn testimony here upon the stand, with right of cross examination, of the officer or officers of the company who made such a statement, and not a letter, so you will not regard it as any evidence of the facts therein stated.

However, it has this bearing on the case. It is offered for the purpose of showing what information Mr. Blake, the defendant, had before him, whether right or wrong, at the time he wrote the alleged libelous communication, all as tending to reflect upon the state of mind and heart which actuated that letter; whether or not it was written in good faith; whether or not there was any actual malice or ill feeling motivated.

So you see the purpose is to lay before you such information as Mr. Blake had when he wrote the alleged libelous letter, as reflecting on those matters, and it is for that purpose and for that purpose only.

Mr. Sothoron: Thank you.

Will the reporter mark this Defendant's Exhibit A, please.

(The letter above referred to, and read to the jury, was marked Defendant's Exhibit A.)

By Mr. Sothoron:

Q. Mr. Blake, did there come a time in these negotiations in which you had to resort to some governmental agency to settle the dispute? A. In due time this dispute was submitted to the National War Emergency Board, which had been set up under an executive order to settle all disputes arising in the merchant marine.

This was necessary due to the fact that all of the maritime unions, including the National Marine Engineers Beneficial Association, had signed a pledge with the government that there would be no strikes or stoppages of work during the war, and then the government turned around and set up this agency to handle and dispose of these disputes.

Therefore, in due time, this dispute was submitted to this Board and hearings were held on it, and it became necessary for Mr. Hogan and myself to prosecute that dispute before this Board, because it just seemed to be impossible to get any assistance from the business agent of the local which had negotiated this agreement.

The Maritime War Emergency Board did hand down a decision—

Mr. Tumulty: May we have the dates, Your Honor, of these occurrences?

Mr. Sothoron: Yes.

By Mr. Sothoron:

Q. Can you fix those dates, Mr. Blake, please?

293 A. I will have to look it up from the record.

The Court: Do you have a reference to it?

Mr. Sothoron: I have a certified copy of this decision here.

The Court: You might inform counsel of the date.

The Witness: That isn't the proper paper.

By Mr. Sothoron:

Q. Can you fix the date as to the first hearing? A. I would have to refer to the records. I think it was in October, 1942.

Mr. Sothoron: Do you want the exact date, Mr. Tumulty?

Mr. Tumulty: I think the date is important, Your Honor.

The Court: Let the witness refresh his recollection from the file.

By Mr. Sothoron:

Q. Refresh your recollection from this file, Mr. Blake. (Handing file to witness.)

Have you refreshed your recollection, Mr. Blake, and can you testify to the date that was submitted to the Board? A. January 14, 1943.

Q. What was the effect of the ruling in respect to the wages and hours on the JOHN ERICSSON, which was the subject matter of that inquiry? A. The Maritime
294 War Emergency Board approved of the wage scale which the National office had submitted to the Board.

In the meantime the executive orders had been issued which required that any adjustment in wages had to be submitted to the National War Labor Board for approval before they could be put into effect.

Q. Was this submitted to that Board? A. That was immediately submitted to the National War Labor Board, and I think on March 17, approximately March 17, 1943, the National War Labor Board approved of the recommendation to the Maritime War Emergency Board, and issued a directive order to the United States Lines to put those wages into effect.

This order made it mandatory that the wages be retroactive to June 22, 1942, which is the date that the engineers signed on under the agreement that they would sail the

ship, and whatever wages were later arrived at would be retroactive.

The Court: Where was the ship then, Mr. Blake?

The Witness: At the time—

The Court: On June 22.

The Witness: San Francisco.

The Court: It had returned to San Francisco?

The Witness: In the meantime (this now is in January, pretty nearly a year later) the JOHN ERICCCSON had been taken out of the Pacific trade evidently and
295 transferred to the Atlantic and was being used in the African campaign and transporting troops over there.

The Court: But you said it was in San Francisco.

The Witness: On June 22, yes.

The Court: And then it came around east?

The Witness: It made a couple of trips back and forth to Australia, but two or three months after that the boat was back in New York again and had been there continuously.

The Court: Very well.

By Mr. Sothoron:

Q. That decision of the national War Labor Board, did it become final? A. The United States Lines took an appeal, claiming that they hadn't had an opportunity to be heard, and the National War Labor Board granted the appeal and ordered the case reheard.

It was sent clear back to the War Emergency Board and it was all gone over again and then it was referred to the Marine Panel.

Mr. Tumulty: Your Honor, may we have the dates when these occurrences took place?

By Mr. Sothoron:

Q. Can you give that information from your memory, Mr. Blake, as to when the rehearing took place? A. The

rehearing took place before the Marine Panel of the
296 National War Labor Board I think on October 12th
or 13th, 1943.

Mr. Tumulty: October, 1943? That is after he wrote
the letter.

Mr. Sothoron: Oh, yes.

The Court: I think anything that occurred after he wrote
the letter would hardly be admissible, would it?

Mr. Sothoron: I was thinking, if Your Honor please,
that would be admissible for the purpose of showing that
his deductions, his interpretations, were normal interpre-
tations that not only he made but that others made.

The Court: It is this jury that will have to decide that,
and not the War Labor Board or anybody else.

It is only admissible as reflecting on his information and
state of mind at the time he wrote the letter. I don't see
how anything occurring after he wrote the letter could have
any bearing on that.

Mr. Sothoron: Only for the reasons I have indicated, and
it is offered for that purpose, Your Honor.

The Court: I don't believe that would be proper.

Mr. Sothoron: Very well, then I won't pursue that after
the date of July 17, 1943.

* * * * *

304 Q. Mr. Blake, there was introduced in evidence by
the plaintiff yesterday a letter written by you to Mr.
Merriweather. Do you recall that incident? A. I have a
recollection of the letter, although the matter contained in
the letter has been settled between Mr. Merriweather and
myself.

Q. This is the letter marked Plaintiff's Exhibit 10.
305 Do you remember that? A. Yes.

Q. Will you tell us what it was that prompted you
to write that letter? What were the surrounding circum-
stances of your writing that letter? A. This letter was
written calling attention to one of our subordinate officials

who I considered was taking undue advantage of the national office.

Q. Undue advantage? In what way do you mean? A. Mainly he had created a habit of using the long distance telephone for calling up from San Francisco to Washington, and sometimes talking as much as half an hour, and it resulted in big bills.

Q. Who paid the bills? A. And not only that, but it was usually on things that should have been transferred by either a night letter or an air mail letter.

During war times, with the restrictions on the use of the telephone and telegraph, especially between Washington and the Coast, I did feel it was my duty to call that to his attention, which I did.

Also, I might say everything in this letter—just to make it short—I thought it was my duty to call to his attention.

Later on he came in to Washington and we sat down and he agreed that he hadn't done what was right, but
306 he asked me to take the letter and all correspondence out of the national file, and we settled it and we did take it out of the file and destroyed it, which we did; so we haven't any official record of this communication at all in the national office now.

Q. Did that letter come out of your file? A. No. This letter—I don't know where it came from. It is not relating to this matter anyway.

* * * * *

308 Q. Mr. Blake, on July 17, 1943, when you wrote that letter and used the words "back door agree-
309 ment," just what did you have in mind? What were your mental operations in reaching the thought of the "backdoor agreement"? A. Well, my own thought on it at that time was that we had, as you already know, been through over a year this dispute on this JOHN ERICSSON matter, and even at that time the case had not been settled.

We supposed it had been settled, but we found out afterwards, in fact just about that time we found out that the

National War Labor Board had allowed the company to take this appeal, and that we would have to go back and go all through this dispute again.

Then there was another matter which has already been discussed, the trouble over the advertising in the magazine, and those things just kind of all put together I thought it was proper to call these things to Mr. Trainer's attention, and also to let the membership know what was being done, because the members are the ones that are involved; they are the ones that pay the expense, and they are the ones that expect benefits from whatever they pay into the association.

I didn't have any malice, but I did think it was my duty to call these things to Mr. Trainer's attention.

My idea then of whatever Mr. Trainer did with the United States Lines agreement—I didn't have any idea, but what there had been some kind of a verbal agreement made, and there was no reason why it shouldn't have been made.

310 The boat was turned over to this company on short notice, and the military authorities were doing everything they could for the company to get the boat moving as quick as they could. They didn't have time to sit down and work out a wage problem or a manning problem.

We know the first thing to do was to get the boat moving, which they did, and they probably said, "We will put these wages into effect."

At the time it was proper to do that and I never questioned it at all, but as this thing kept going on and on, and it appeared we wasn't getting the help from Mr. Trainer that we should have gotten to get this thing adjusted, because he never appeared down here when we had a hearing before any governmental agency, and if we wanted any information from him, he just never could find it, and it did get where it was very aggravating to us because we (at least I did) considered we had a moral responsibility to these men that kept this boat going.

* * * * *

311 This had been a year, and just through neglect and lack of help we still hadn't got this adjustment made, and I think under the circumstances I was fully justified in writing to Mr. Trainer as I did, and he again took exceptions to it. And he didn't even then try to do anything to help this adjustment through.

By Mr. Sothoron:

Q. Mr. Blake, did you have in mind by that expression that Mr. Trainer was dishonest? A. I did not.

Q. Did you have in mind he was being bribed? A. I did not.

Q. Did you have in mind that Mr. Trainer had sold out his union? A. I did not.

* * * * *

314 Cross Examination

By Mr. Tumulty:

* * * * *

317 Q. Now, in January of 1942, when the United States lines acquired the operation of the KUNGS-HOLM, where were you at that time? A. Here in Washington.

Q. In January of 1942? A. Let's see, wait a minute, no, I was still on the Great Lakes.

Q. You were still on the Great Lakes? A. Yes, sir.

Q. And you didn't become the secretary-treasurer until May 1942? A. In May, yes, sir.

Q. So you had absolutely no personal knowledge at all about anything that went on in Washington or in New York prior to the time you became secretary-treasurer with reference to this matter? A. Oh, I wouldn't say I didn't have any knowledge. I knew what was going on.

Q. You knew what was going on about the KUNGS-HOLM? A. Not just particularly in detail, but I was a member at that time of the National Executive Committee

and I knew what was going on because we were kept informed of those things, but this particular incident, I didn't know about it.

Q. You didn't know whether Mr. Trainer had made an agreement in January 1942 with the United States Lines?
A. No, sir.

Q. Any knowledge you acquired after that date you acquired as secretary-treasurer of the National Association?
A. Yes, sir.

Q. You testified you first heard of this matter
319 about June 15, 1942? A. Approximately just a few days prior to June 22nd, I think.

Q. And the occasion was that you received a telephone call from the War Shipping Administration? A. Yes, sir.

Q. Who made that telephone call, do you recall? A. Captain Devlin.

Q. Captain Devlin? A. The Marine Superintendent.

Q. At that time, who owned the JOHN ERICSSON?
Who was the owner of the JOHN ERICSSON? A. The United States Government.

Q. Through the War Shipping Administration? A. The Maritime Commission owns the boat.

Q. And Mr. Devlin is an official of the War Shipping Administration? A. Yes, sir.

Q. Now, were you on the telephone line when these conversations took place between Mr. Devlin and Mr. Hogan?
A. I couldn't say exactly, no.

Q. You testified to what took place. A. I often do listen in to some of these things, but just at that time it was just starting. It hadn't gotten down to a serious place yet.

320 Q. You were advised of what took place shortly after it took place? A. Yes, sir.

Q. And you said in your direct examination that it was stated over the telephone that the wages had been set for the JOHN ERICSSON before she left New York; is that correct? A. Stated over the telephone?

Q. It was stated.

Mr. Sothoron: Just a moment, that was not testified to as on the telephone. It came out in a letter from Mr. McCarthy.

By Mr. Tumulty:

Q. There was testimony to the effect that during this conference it was said that the wages had been set before the vessel left New York? A. I think that is right. Of course, we knew that some wage scale had been set in New York, it would have to be.

Q. Were you advised at that time that there had been an agreement, a verbal agreement of any kind, between Mr. Trainer and the officials of the United States Lines? A. The only thing we got was from Captain Devlin, and he claimed that the wages had been agreed upon, but we were never able to get a letter from them saying what the wages were, that is, that had been signed as an agreement.

321 We wrote to Mr. Trainer and asked him if there had been any agreement made and signed, and Mr. Trainer wrote back that there hadn't been.

Q. I show you a copy of a telegram which was sent to Mr. Merriweather by Mr. Devlin on June 17, 1942. Did you ever see a copy of that telegram? A. I seen that, yes, sir.

Q. You saw it? A. Yes.

Q. Did you see it in June of 1942 at or about the time it was sent. A. Let me have that telegram.

Q. Does that telegram say: "There has been no agreement for this type ship as she was hurriedly manned and dispatched"? A. That is Captain Devlin. He is not a party to the dispute at all.

Q. He was representing the United States Government, the owner of the vessel, wasn't he? A. He is not representing the operators who we had the agreement with.

Q. He had talked with McCarthy before he sent this telegram, hadn't he? A. He might have.

Q. You know that? A. I didn't hear him talk with
322 them, no.

Q. You know when he got in touch with the owner he got in touch with the union and he sent this to Mr. Merriweather? A. I didn't hear him talk to them. I assume he did, but I didn't hear him talk to them.

Q. You saw the telegram, didn't you? A. Yes.

Q. And you knew it was signed by a government official representing the owner of this vessel? A. Yes.

Q. After he had conversations with Mr. McCarthy and Mr. Hogan? A. Yes.

Q. Does this telegram read as follows:

"Confirming our telephone conversation this date (June 17, 1942) United States Lines in New York City through their Mr. McCarthy, Vice-President in charge of operations, will upon request of the National Organization of the Marine Engineers Beneficial Association open negotiations for wage revision on the motorship JOHN ERICSSON type X. United States Lines are the appointed agents of the War Shipping Administration and they alone can enter into collective bargaining agreements with their contracted
323 unions. There has been no agreement for this type ship as she was hurriedly manned and dispatched. Under no circumstances shall this vessel be held up pending negotiations between the United States Lines and Marine Engineers Beneficial Association. It is understood that any agreement reached shall be retroactive to the sailing of this vessel on her current voyage."

You knew that in June of 1942? A. Yes, sir.

Q. When this dispute first arose? A. Yes, sir.

Q. The wire is signed by J. F. Devlin, War Shipping Administration; is that correct? A. Yes.

Q. And copies were sent to Commissioner Macauley and Mr. Sam Hogan, President, M.E.B.A., 313-316 Machinists Building? A. That is right.

Q. This telegram states that "negotiations are to be opened with the National Organization;" is that correct?

A. Yes, sir.

Q. And that is your organization? A. Yes, sir.

Q. You and Mr. Hogan? A. Yes, sir.

324 Q. So that it was your job to negotiate the agreement, wasn't it? A. Yes, sir.

Q. Did you ask Mr. Trainer for his help? A. We did.

Q. When did you ask him for his help? A. In various telephone conversations.

Q. Didn't you ask him to sit in at the negotiations? A. Mr. Hogan might have.

Q. You know he did, don't you? A. I don't particularly know he did.

Q. He wouldn't have sat in on it if Mr. Hogan hadn't asked him, would he? A. He never did, as I know of.

Q. He never did sit in? A. Not on any of them handled before the Maritime—

Q. I am not speaking of that. I am speaking of the negotiations between the company and the union. A. As far as I know, there wasn't any negotiations. They didn't negotiate. They just met and disagreed. That is not negotiating.

Q. Didn't each side submit a proposal? A. Each side submitted a proposal.

Q. Didn't they argue about it? A. It was a deadlock.

325 Q. It was a negotiation just the same? A. It was hardly a negotiation.

Q. You are splitting hairs on that. There was a negotiation in this case, wasn't there? A. Well, you can call it a negotiation, if you want to.

Q. And Mr. Trainer sat in at that negotiation with Mr. Hogan representing the National Association? A. Mr. Hogan and Mr. McCarthy, I believe.

Q. And he did that at the request of Mr. Hogan? A. I wouldn't know whether he did or not. Mr. Hogan told me

that when he went to New York to meet Mr. McCarthy that Mr. Trainer appeared there, too. I don't know just off-hand whether Mr. Hogan asked him to be there or not.

Q. Don't you know that Mr. Hogan asked him on several occasions to postpone the appointment because Mr. Merriweather couldn't get there? A. They wanted to get Mr. Merriweather and have Mr. Merriweather and Mr. Trainer both there.

Q. And it was Mr. Trainer who arranged for the final conference held on July 27 in New York City, wasn't it? A. I think that was arranged by letter from Mr. Hogan to Mr. McCarthy.

Q. He arranged for the postponements of the conference on two occasions, isn't that correct, at Mr. Hogan's
326 request? A. Yes, sir, he did.

Q. Did Mr. Hogan discuss what took place at that conference when he returned from New York in July of 1942, didn't he report to you? A. We discussed it. I wouldn't say it was reported to me. We discussed it.

Q. You discussed it? A. Yes.

Q. Did he tell you what the United States Lines' attitude was and what the union's attitude was? A. He brought back their proposal.

Q. He brought back their proposal? A. Counter-proposal.

Q. Did he tell you that the United States Lines Company had said that they had an agreement with Mr. Trainer in January 1942 and that the wage scale of the vessel was agreed to by Mr. Trainer? A. I have forgotten—not just in connection with that meeting.

Q. Isn't it a fact that there was no such assertion made by the United States Lines Company at that time? A. Their assertion right along was that they held a collective bargaining agreement executed by Mr. Trainer.

Q. That is the agreement of November 25, 1941,
327 isn't that what you are talking about? A. The amendments to that had been made by Mr. Trainer,

and this wage scale had been agreed upon by Mr. Trainer.

Q. Did they say this wage scale had been agreed to by Mr. Trainer at the July 27, 1942 meeting? A. I wasn't at the meeting.

Q. Did Mr. Hogan tell you that? A. He claimed it was the contention of the company, and every contact I had with the company they kept claiming that they had made this agreement with Mr. Trainer. Captain Devlin claimed that to start with.

Q. Captain Devlin claimed that? A. I know, but we had a lot of telephone conversations with Captain Devlin, and he claimed that right from the start.

Q. Why did he make that statement then if he claimed that right from the start. A. That is a correct statement, there was no agreement, no signed agreement.

Q. It doesn't say there is no signed agreement, does it? A. That is what we mean when we talk about an agreement, a signed agreement, with somebody's name on it. It was a correct statement, there was no agreement. He had to make that statement.

Q. If there was an agreement made by one of your
328 representatives, wouldn't you stand by it? A. If it was signed, yes.

Q. If it was a verbal agreement, wouldn't you stand by it? A. If he had said he had made and agreed to a verbal agreement, but he didn't say that.

Q. Isn't it a fact that there was no mention by the United States Lines Company about any conversation with Mr. Trainer about these wages from July, when this conference was first held, until November, when this letter was sent to you? A. Only verbally.

Q. Only verbally? A. Engineers don't go aboard ships unless they know what wages they get.

Q. Isn't it a fact that the United States Lines Company never said to any representative of your union and never wrote any letter to your union in which they asserted that there had been any agreement, verbal or written, with Mr.

Trainer regarding this wage scale, until November of 1942?

A. They continuously made the claim.

Q. Did they make it in your presence? A. Not in my presence, no.

Q. Can you point to any letter which intimated that? A. I am pretty sure there was. I have letters even before that.

Q. Will you point to that? A. They admit it in this letter here (indicating).

Q. They don't admit it. They made an assertion? A. They made an assertion that it was made.

Q. You knew when the dispute first arose and when it was brought up to them by Mr. Devlin they agreed to negotiate an agreement, and they told Mr. Devlin there was no agreement on this type ship because she was hurriedly manned and dispatched? A. Yes.

Q. And you knew the United States Lines Company was fighting this thing as hard as they could? A. Yes.

Q. They were doing everything they could to prevent any increase in those wages, weren't they? A. Yes, sir.

Q. They were fighting the union? A. That is right, but they did set that wage scale.

Q. They set the wage scale? A. Yes.

Q. But they never said that they had conferred with Mr. Trainer in any way with respect to it until November 1942?

A. I can't imagine why they wouldn't all this time.

Q. I am asking you to show me a letter in which they said that. There was a lot of correspondence that passed back and forth, wasn't there? A. Yes.

Q. You picked out one letter in November, nearly six months afterwards, in which they first mentioned Mr. Trainer's name? A. There were plenty of letters there where they claimed they had this agreement with Mr. Trainer, and he is the bargaining agent, and I know Mr. Trainer very well, and he would never have stayed away six months and done nothing about the wages. Somebody set the wages.

Q. You heard the testimony and you knew the vessel was a troop ship? A. Yes.

Q. You knew the vessel was at San Francisco at the time the dispute first arose? A. Yes, sir.

Q. Didn't they tell you it was a troop ship and had to get out? A. Yes, sir.

Q. Didn't they tell you it had been to Australia? A. They didn't tell us where it had been.

Q. Didn't Merriweather tell you the engineers had come back from a voyage to Australia and that they
331 wouldn't sign on again? A. The boat had been in the ship yards a couple of months for extensive repairs.

Q. Following the voyage? A. Following the voyage.

Q. Some of the men who had been on that voyage wouldn't sign on for another voyage, isn't that true? A. The trouble started, evidently it paid off a lot of the men when they went in the ship yard, and they went to get other employment, and when they went to replace those men they couldn't get anybody to sign on.

Q. You didn't view this statement that you referred to in the November 6th letter with any suspicion that that was an after thought by the United States Lines Company? A. What was an after thought?

Q. To say that they had had a discussion with Mr. Trainer and he had agreed to the wage scale? A. That wasn't in the picture then.

Q. You testified you relied on the letter of the United States Lines Company, you believed in it; isn't that right? A. That was November 6th.

Q. That was November 6th? A. Yes.

Q. When you wrote the letter on July 17, 1943, you
332 did it in the belief based on the letter of November 9 from the United States Lines Company? A. Yes.

Q. You believed that letter? A. Yes, sir.

Q. As against Mr. Trainer's statement that he never made such an agreement? A. Yes, sir.

Q. And as against the fact that from July until November they never made such a statement? A. Yes.

Q. You took their word for that? A. I did, along with the fact that the boat had been running all this time and they were paying these wages and somebody had set the wage scale.

Q. That was the only cause you had for that? A. That is enough.

Q. That is enough for you, is that it? A. It seemed to suit the National War Labor Board, too.

Q. The letter of November 6th, which has been offered in evidence as Defendant's Exhibit A—is that correct?

Mr. Sothoron: That is right.

By Mr. Tumulty:

Q. Are you aware of the fact that Mr. Hubert
333 Wyckoff, the director of the division of Maritime Labor Relations of the Maritime Commission wrote Mr. McCarthy with reference to that letter and sent you a copy? A. I think he did, yes, sir.

Q. Will you look at that and see if you recognize that letter? A. I remember that, yes.

Q. You remember that letter? A. Yes.

Q. I show you a copy of the November 6th letter from United States Lines addressed to Mr. Hogan. I call your attention to the statement:

"We do not recognize power tonnage as an element in fixing a wage scale and we have been advised by the War Shipping Administration that it does not recognize power tonnage as a basis for an agreement."

Was that a true statement? A. That they do not recognize it? That they didn't?

Q. Yes. A. Evidently they didn't recognize it.

Q. You know as a matter of fact that the Maritime Commission had advised the United States Lines and your union that they did recognize power tonnage, isn't that a fact? A. The War Shipping Administration did, yes.

Q. They had notified the union and the United
 334 States Lines at the very beginning of this contro-
 versy that they did recognize power tonnage; you
 knew that? A. I knew that, yes. I knew that the War
 Shipping did, yes.

Q. There is a statement that "We have been advised by
 the War Shipping Administration that it does not recognize
 power tonnage." A. Captain Devlin made that statement.

Q. Didn't he write another letter immediately after that
 and say that was incorrect? A. Yes.

Q. And he wrote that to Mr. McCarthy? A. Yes.

Q. You knew when you read that letter that that was not
 a correct statement, that Mr. McCarthy had made an incor-
 rect statement in that letter, didn't you? A. Yes.

Q. You didn't believe that statement, then? A. Naturally
 not because I knew what the answer was. We made Cap-
 tain Devlin correct that statement that he made.

Q. You knew it and you made him correct it when you
 received Mr. McCarthy's letter? A. Yes.

Q. So that is one statement in that letter which
 335 wasn't true, to your knowledge? A. Yes, and we
 made him correct that, too, the same as we did Cap-
 tain Devlin's statement.

Q. I call your attention to another statement:

"Under the circumstances, there is of course no reason
 to have any retroactive feature in the agreement and under
 no circumstances would we agree to make a wage agree-
 ment retroactive to cover a completed voyage."

Is that a true statement? A. It is true as far as they are
 concerned. We didn't agree to it.

Q. But as a matter of fact it wasn't true as far as they
 were concerned, was it? A. They said so, but we didn't
 agree to it.

Q. They said so, but it wasn't so? A. We didn't agree
 with it.

Q. Didn't Captain Devlin send a telegram which I read before in June, when this dispute arose, to Mr. Merriweather, as a result of conferences with Mr. McCarthy and Mr. Hogan, in which he said, "It is understood that any agreement reached shall be retroactive to the sailing of this vessel on her current voyage"? A. Mr. McCarthy wasn't a party.

Q. Mr. McCarthy was in on the conferences that preceded that, wasn't he? A. Mr. McCarthy wasn't—

336 Q. You knew Mr. McCarthy had talked to Mr. Devlin? A. Mr. McCarthy wasn't a party. The only party to that was the M.E.B.A. and the War Shipping Administration. Mr. McCarthy wasn't a party to that telegram at all.

Q. He wasn't a party to the telegram, but he was a party to the conferences? A. He wasn't a party to the conferences. There wasn't any conference.

Q. He was called on the telephone by Captain Devlin? A. He may have been.

Q. You know he was? A. I don't doubt that.

Q. This is the way he got it settled with the United States Lines and the M.E.B.A.; he had to get the boat out? A. McCarthy didn't have anything to do about that. The War Shipping Administration sent that telegram what they would do and McCarthy didn't even agree with that.

Q. Why did he call Mr. McCarthy up? A. I don't know, that was his business. McCarthy didn't agree to that.

Q. He says in this letter:

"United States Lines are the appointed agents of the War Shipping Administration and they alone can enter into collective bargaining agreements with their contracted unions."

337 And he said: It has been arranged for conferences to be held? A. Yes.

Q. And then he said: "It is understood that any agreement reached shall be retroactive to the sailing of this vessel on her current voyage"? A. Yes.

Q. And yet here in the November 9 letter Mr. McCarthy says: There is no reason to have any retroactive feature in the agreement. There was a reason, wasn't there? A. There was a reason. The Government had promised us this would be retroactive, but Mr. McCarthy never agreed to it. He didn't agree to the telegram. He wasn't a party to it.

Q. He was a party to the negotiations that preceded the sending of this telegram, and you knew that? A. We never had any conferences with Mr. McCarthy. It was entirely with the War Shipping Administration and Mr. Hogan and myself.

Mr. Tumulty: If your Honor please, I desire to offer this copy of telegram in evidence.

Mr. Sothoron: I am not quite clear of the purpose, Mr. Tumulty.

The Court: It is in evidence.

Mr. Sothoron: It has been read several times.

338 Mr. Tumulty: This is part of the information he had when he wrote the letter.

The Court: It will be received.

(The telegram was marked and received in evidence as Plaintiff's Exhibit No. 11.)

By Mr. Tumulty:

Q. So, then, going back to the November 6 letter, there are three statements in that letter, as I recall. One is that they don't recognize power tonnage. The other is that there is no reason to make this retroactive. And the third was that "We had notified Mr. Trainer." A. What is the third one?

Q. That "We had notified Mr. Trainer in January". A. Yes.

Q. You didn't rely on the other two, but you relied on the statement that they had notified Mr. Trainer? A. Those were three matters that were in dispute. The retroactive feature and the other one there you mentioned, they were already in dispute, the same as the wages.

Mr. Tumulty: If the Court please, I desire to offer in evidence the letter of Mr. Wyckoff dated November 13, 1942, addressed to A. J. McCarthy, Vice-President of the United States Lines.

Mr. Sothoron: May I see that, please?

Mr. Tumulty: The witness has identified it.

339 Mr. Sothoron: Have you already read it?

Mr. Tumulty: I haven't read it to the jury. The witness has read it.

The Court: There was some reference as to its contents. It may go in.

Mr. Sothoron: I have no objection, sir.

(Their letter was thereupon marked and received in evidence as Plaintiff's Exhibit 12.)

(Mr. Tumulty reads Plaintiff's Exhibit 12 to the jury.)

By Mr. Tumulty:

Q. And you testified that you had seen that letter before you wrote the letter of July 17, 1943? A. Yes, sir.

Q. Isn't it a fact that when Mr. Hogan received the letter of November 6 from Mr. McCarthy he wrote Mr. Trainer regarding it and brought to his attention the statement made in it by Mr. McCarthy; isn't that a fact? A. Yes, sir.

Q. And you knew that at the time, didn't you? You knew it before you wrote the July 17 letter, didn't you? A. I think I did, yes, sir.

Q. You did. Do you recall seeing the letter of which this is a copy (handing paper to witness)? A. Yes, sir.

340 Q. Do you recall seeing this letter (handing paper to witness)? A. Yes, sir.

Mr. Tumulty: I would like to offer these letters in evidence, your Honor.

The Court: Very well.

(The two letters were thereupon marked and received in evidence as Plaintiff's Exhibits Nos. 13 and 14.)

(Mr. Tumulty reads Plaintiff's Exhibits 13 and 14 to the jury.)

By Mr. Tumulty:

Q. You knew Mr. Trainer had written such a letter to Mr. Hogan denying he had made any agreement; isn't that right? A. He consistently denied that he had made any agreement.

Q. This was the first time he ever denied it, wasn't it? A. This is the first time he ever put it in writing.

Q. It was the first time it was brought up, wasn't it? A. It was brought up consistently, and this is the first time he put it in writing.

Q. When was the first time it was brought up, to your personal knowledge? A. The first time the trouble started, there was a telephone conversation. Mr. Hogan tried
341 to find out if there had been any agreement made, and Mr. Trainer claimed right along there hadn't been.

Q. Mr. Hogan called him the day Mr. Devlin got in touch with you? A. Yes.

Q. And said, "What agreement is the JOHN ERICSSON under?" A. Yes.

Q. And Mr. Hogan said, "We have no agreement on the JOHN ERICSSON"? A. Yes.

Q. And the United States Lines Company said there never was an agreement with Mr. Trainer.

342 In November 1942, when they first mentioned his name in connection with any agreement and when it was brought to Mr. Trainer's attention, he said he positively had made no agreement? A. Yes.

Q. And you knew that? A. Sure, I knew that.

Q. Isn't it true that one of the bones of contention was the question of the class of the vessel? A. That is right.

Q. That was one of the most important questions in the case, wasn't it? A. Yes, it was.

Q. What did the United States Lines contend? A. They contended the boat should properly be classified as A-2.

Q. What did the M.E.B.A. contend? A. That it should be classified as A-3.

Q. And it was necessary to get evidence, was it not, to prove what class the boat was in? A. Well, if that had to be the deciding factor, I don't know whether it has ever been proven what the class of the boat is.

Q. You know that Mr. Trainer endeavored to secure proof that she was in Class A-3, don't you? A. I never knew of Mr. Trainer trying to get us that evidence.
343

Didn't you know that he had secured such evidence and turned it over to Mr. Hogan? A. I did not.

Q. Did you ever ask Mr. Hogan if Mr. Trainer had helped him in this case at all? A. I am pretty sure that I did, because I know we kept trying to do everything we could here in Washington to get that evidence, and we couldn't get it here.

Q. Isn't it a fact that you submitted a magazine article to the War Shipping Administration to prove she was in Class A-3? A. That magazine article came from Mr. Merriweather.

Q. Didn't you know that the magazine article had been resurrected by Mr. Trainer? A. No, I did not. Mr. Merriweather claimed he got it. Just where he got it from, I don't know.

Q. Mr. Hogan had a copy of it, didn't he? A. Mr. Merriweather was here and he brought some of those copies with him when he came here.

Q. He didn't come here for the conference, did he? A. No, he was here on other business. It was later on.

Q. Mr. Hogan had a copy of this before that? A. That magazine article wasn't a deciding factor any way in settling this dispute.

344 Q. Wasn't it referred to in the presentation to the War Shipping Administration on this matter as establishing the class of the vessel? A. I doubt if it was, because we never had been able to really establish the class of the vessel.

Q. Didn't you testify when I took your deposition that you prepared the statement of facts which was submitted to the War Shipping Administration? A. I did, yes.

Q. Didn't you refer to a magazine article concerning the trial run of this vessel in your statement at that time? A. I think I did, yes, sir.

Q. Mr. Merriweather had not been there up to that time, had he? A. I am pretty sure up to that time we didn't have a copy of the magazine article. I think Mr. Merriweather wrote and told us about this article that appeared in one of the marine papers at about such and such a date, and gave us the article on it.

Q. Is this the article? A. This is the first time that I have ever seen this letter, but we didn't have this (indicating) when we wrote the brief which we referred to.

We had this information at the last appeal of this case before the Marine Panel of the War Labor Board,
345 but we didn't have this when we wrote up that brief.

Q. Do you have the statement of facts submitted to the War Emergency Board?

Mr. Sothoron: I don't believe we do.

Mr. Tumulty: If Your Honor please, I believe the document that I referred to is probably attached as an exhibit to Mr. Blake's deposition.

(The Court hands the papers to Mr. Tumulty.)

Mr. Tumulty: Thank you.

By Mr. Tumulty:

Q. You stated you prepared the statement of facts submitted to the Maritime War Emergency Board, did you not? A. I did.

Q. Was a copy of that statement of facts sent to Mr. Trainer, to your knowledge? A. I think it was, yes, sir.

Q. What was it sent to Mr. Trainer for? A. Well, he was an interested party to the dispute and I think everything like briefs and things like that in the case we always sent a copy up to Mr. Trainer.

Q. Isn't it a fact that it was sent to Mr. Trainer for his suggestions? A. We would hardly send it to him for his suggestions after we had made up the statement of facts and submitted it to the Board.

346 Prior to submission to the Board? A. No, sir, it was not.

Q. You couldn't be mistaken about that? A. We might have wrote to him and asked him for suggestions.

Q. Oh, you did? A. I say that they might have, but we drew up that statement of facts and we presented them.

Q. It is a fact that it was submitted to Mr. Trainer for his suggestions, wasn't it? A. After it was submitted to the Board?

Q. No, before it was submitted to the Board? A. I doubt it very much.

Q. You drew it up, you ought to remember that. A. There have been quite a lot of operations the last year, and to remember every little detail right offhand, my head isn't that big.

Q. The question of the class of the vessel was an important fact, wasn't it? A. It was an important fact.

Q. The question of the manning scale was an important fact, was it not? A. It is an important fact, yes.

Q. Isn't it a fact, don't you recall now that the statement of facts was submitted to Mr. Trainer for his suggestions, and that he replied calling attention to two errors:

347

One, that you had said the boat was a sister ship of a smaller vessel, the GRIPSHOLM, A-2; and you had called for a manning scale for less engineers than should be on the vessel? A. We wrote to Mr. Trainer to get information of what that manning scale should be and we had to go ahead and get this information in before the Board.

After the information was in before the Board, then Mr. Trainer pointed out that we had made these errors, and after the statement of facts had been submitted to the Board, but he didn't help us prepare it.

Q. He didn't help you to prepare it? A. No, sir.

Q. Did you ask him to? A. We did.

Q. When? A. We continuously asked him for help on these things.

Q. Isn't it a fact that you didn't prepare this statement?

A. I did prepare it.

Q. It was prepared by Mr. Wyckoff of the War Shipping Administration, was it not? A. It was not, absolutely not.

Q. And it was submitted to Mr. Trainer by Mr. Hogan before it was officially filed and Mr. Trainer promptly replied that you had made two errors in it, and he called your attention to it, and you advised the War Shipping Administration of those errors; do you remember that? A. I have no recollection of any such performance at all.

Q. Would it refresh your recollection to refer to your correspondence on it? A. It is merely hearsay that any such thing as that took place. The statement of facts wasn't submitted to the War Shipping Administration.

Q. The Maritime War Emergency Board, which is an agency of the War Shipping Administration? A. No, it is not.

Q. Its offices are in the War Shipping Administration? A. Their offices happen to be there, but it is an agency of the United States government appointed by the President.

Q. If Mr. Trainer called attention to certain errors, wouldn't you say he was cooperating with Mr. Hogan and yourself? A. Not when he called attention to a mistake after the damage was already done.

Q. No damage had been done at that time? A. There wasn't any damage done, but when he called our attention to this, it was after this statement had been submitted to the Board, and then he came out and said it was all
349 wrong, but he wouldn't do that before it had gone to the Board.

Q. Are you absolutely certain that is so? A. I know that as far as the help from him was concerned we didn't get that information until after—

Q. That would be an important matter, wouldn't it? A. I don't consider—

Q. (Interposing.) You testified he didn't cooperate? A. He didn't.

Q. Are you absolutely sure that the answers you gave me are correct? A. They are correct to my best knowledge and belief, yes, sir.

Q. This is the statement of facts that you have been referring to, Mr. Blake. Can you identify that?

(Witness examines paper.)

A. From just going through this hurriedly, I would say this was the statement of facts.

Q. That is the statement of facts which you submitted to the Maritime War Emergency Board? A. Yes, sir.

Q. Do you still contend that you prepared it? A. I do, yes, sir.

Q. Now, this document is entitled "Proposed Statement of Facts to be submitted to the Maritime War Emergency Board in the dispute between the United States
350 Lines Company and the Marine Engineers Beneficial Association over the M.V. JOHN ERICSSON." A. Yes.

Mr. Tumulty: I desire to offer it in evidence and to offer as part of the same exhibit a letter dated December 10, 1942, from Mr. Hubert Wyckoff, Director, Division of Maritime Labor Relations, War Shipping Administration, addressed jointly to Mr. S. J. Hogan, president, M.E.B.A., and Mr. McCarthy, vice president of the United States Lines, and a letter dated December 16, 1942, addressed by Mr. Hogan jointly to Mr. R. Merriweather in San Francisco and Mr. Trainer in New York.

Mr. Sothoron: May I see those, Mr. Tumulty, please?

Mr. Tumulty: Yes.

Mr. Sothoron: If Your Honor please, I don't understand the point at all in offering this series of correspond-

ence here, so I am going to object to it. I don't see any relevancy or materiality to it at all.

The Court: Mr. Blake has admitted knowledge of the statement and says he is the author of it. If there are any parts in particular to which you wish to direct his attention as contradictory of anything that he has testified to, wouldn't that be sufficient?

Mr. Tumulty: I believe, Your Honor, it is a rather
351 important factor, in view of the fact that he has testified here that Mr. Trainer refused to cooperate with him and that was part of his information on which he based his opinion that he has made a back door agreement.

The Court: Is there anything there in the statement to the contrary?

Mr. Tumulty: This statement which Mr. Blake says he prepared, but which this indicates it was prepared by Mr. Wyckoff and submitted to the N.M.E.B.A., states the facts as they were known at that time. Among other things, it states that there was no agreement made, and among other things it states that the vessel was a sister ship of the GRIPSHOLM, and it states the manning scale, and the correspondence attached to it shows that it was prepared by Mr. Wyckoff and submitted to Mr. Hogan, and that Mr. Hogan sent copies to Mr. Trainer and Mr. Merriweather, and that Mr. Trainer promptly replied calling attention to two errors in the statement, which strengthened the statement from the standpoint of the company.

The Court: The witness was examined. Suppose that statement be admitted without reading it in full but with the right of either party to make such references to it as they may deem material to their own interests.

Mr. Sothoron: Very well, Your Honor. I think that will shorten it anyhow.

352 The Court: I think it is admissible, that is, certain parts which Mr. Tumulty has referred to would be admissible, and that of course would necessarily open up the whole statement, if you gentlemen see any other features on it that will have a bearing on it.

Mr. Sothoron: Very well, Your Honor.

The Court: Very well. It will be admitted.

I suggest you not read any more of it. Bring out the points you have indicated, leaving it to the other side to make such further references as they desire.

Mr. Tumulty: That will be satisfactory.

The Court: As to that correspondence, if I understand, Mr. Blake has admitted his knowledge of those letters.

Mr. Tumulty: That is right.

The Court: So they may be admitted, too.

(The statement of facts and accompanying correspondence was thereupon marked and received in evidence as Plaintiff's Exhibit No. 15.)

By Mr. Tumulty:

Q. I call your attention to the statement of facts which you say you prepared. In the first paragraph it states as follows:

"The motorship JOHN ERICSSON, formerly the KUNGSHOLM, was purchased from the Swedish-American Line by the United States Maritime Commission and delivered to the United States Lines Company on 353 December 31, 1941 under a Special Agency Agreement."

Is that correct? A. As far as I knew, yes, sir.

Q. "This vessel, the sister ship of the famous GRIPSHOLM, is approximately 608 feet in length," etcetera. Do you recall making that statement? A. Yes, sir.

Q. Do you recall making this statement:

"At the time this agreement was executed, the company was not operating any vessels as large, consequently when this ship was delivered to the United States Lines Company, the existing agreement provided no suitable wage or manning scale adaptable to the vessel."

Are those your words? A. Yes, sir.

Q. "In January 1942 the JOHN ERICCCSON left New York without a supplement to the existing collective bargaining agreement having been negotiated to cover the vessel; the company, however, put into effect the following manning and wage scale,"

Q. Was that your statement? A. That is right.

Q. And then you set forth a manning and wage scale? A. That the company put into effect.

Q. That the company put into effect? A. Yes, 354 sir.

Q. You didn't state in this statement that Mr. Trainer or that your representative had agreed to the wage scale? A. We had a collective bargaining agreement with the company that we have put into effect, which was supposed to be agreed on between the representative and the company. That would be Mr. Trainer.

Q. You testified it was hurriedly manned and dispatched? A. Yes.

Q. You know there wasn't time to sit down and negotiate a wage agreement, didn't you? A. This was a year later, and it was still in effect.

Q. Did you make this statement:

"In June 1942 the JOHN ERICCCSON arrived at San Francisco and some replacements were required in the vessel's engineering staff"?

A. Yes, sir.

Q. "West Coast members objected to signing the ships articles under the existing wage scale,"

and Captain Devlin sent a wire to Mr. Merriweather "stating that the vessel had been hurriedly manned and dispatched and that no agreement had been reached regarding the vessel; that he had been assured by Mr. McCarthy, vice president of the United States Lines, that the company would be willing to enter negotiations regarding the 355 vessel and that any wage scale reached would be

retroactive to the sailing of the vessel in its current voyage.”

You made that statement? A. Yes, sir.

Q. And those are the facts that you knew of your own knowledge at that time? A. Yes, sir.

* * * * *

356 Q. Referring again to Plaintiff's Exhibit 15, the statement of facts, I call your attention to certain statements that are contained in that.

You saw this statement of facts at the time it was submitted by the Maritime War Emergency Board, did you not? A. I did.

Q. Did you see this letter which Mr. Hogan sent to Mr. Trainer and Mr. Merriweather? A. I evidently dictated the letter because my initials are on the letter.

Q. It is fair to say, is it, that the substance of this letter is that Mr. Hogan was submitting a copy of the statement of facts prepared by the War Emergency Board to Mr. Merriweather and Mr. Trainer, for their views as to whether or not the statement of facts was correct, before he signed and approved the statement of facts? A. That is right.

Q. I show you copy of a letter dated December 17, 357 1942, from Mr. Trainer to Mr. Hogan in reply to his letter of December 16 and ask you if you recall having seen a copy of that? A. That is right.

Q. Is it fair to state that the substance of this letter is that Mr. Trainer called Mr. Hogan's attention to the fact—

Mr. Sothoron: Excuse me. If your Honor please, is that letter in evidence?

Mr. Tumulty: It is not in yet.

Mr. Sothoron: Please don't read it and then offer it in evidence.

(Counsel for plaintiff hands letter to counsel for defendant.)

Mr. Tumulty: I offer this letter as Plaintiff's Exhibit 16.

The Court: If there is no objection it will be admitted.

(Plaintiff's Exhibit 16, referred to above, marked and received in evidence.)

By Mr. Tumulty:

Q. Is it true that the substance of this letter is that Mr. Trainer called Mr. Hogan's attention to an error in the manning scale whereby two assistant engineers were provided for less than the number which should be in
358 force on the vessel, and that he also called attention to the fact that the vessel was compared with the GRIPSHOLM, which was a Class A-2 vessel, where as the ERICSSON is in Class A-3? A. That is substantially correct, although both matters were irrelevant to the question.

Mr. Tumulty: I move that the last remark be stricken, your Honor.

The Court: Yes, that will be stricken; that is not responsive to the question.

By Mr. Tumulty:

Q. Do you recall having seen a copy of this letter at or about the time it was written, a letter dated December 21st, from Mr. Hogan to Mr. Trainer? A. I think I have seen a copy of that letter, yes.

Q. You testified that you saw a copy of the letter at or about the time it was received; isn't that correct? A. Yes, sir.

Q. At or about the time it was mailed, I should say, or prepared? A. Yes, sir.

Q. It is a letter to Mr. Trainer? A. Yes, sir.

Mr. Tumulty: I offer that as Plaintiff's Exhibit 17.

(The letter referred to above was marked Plaintiff's Exhibit 17 and received in evidence.)

359 By Mr. Tumulty:

Q. Is it not true that the substance of this letter is that Mr. Hogan, who wrote the letter to Mr. Trainer, tells Mr.

Trainer that he is absolutely correct, and that there was an error in the statement of facts, and that he thanks Mr. Trainer for calling the error to his attention? A. Yes, sir.

Q. Mr. Blake, this is a copy of a letter dated December 21, 1942, from Mr. Hogan to Mr. Wycoff, of the War Shipping Administration.

Do you recall seeing a copy of that letter at or about the time it was written? A. I have seen a copy of that letter, yes, sir.

Q. Isn't it true that the substance of this letter is that Mr. Hogan advised Mr. Wycoff of the two errors that had been called to Mr. Hogan's attention by Mr. Trainer, and requested him to correct the statement of facts accordingly? A. Yes, sir.

Mr. Tumulty: I offer this in evidence as Plaintiff's Exhibit 18.

(The letter referred to above was marked Plaintiff's Exhibit 18 and received in evidence.)

By Mr. Tumulty:

Q. Mr. Blake, Plaintiff's Exhibit 10 is a copy of a letter which you wrote to Mr. Merriweather under date of 360 June 17, 1943 in which among other things you objected to certain long-distance telephone calls of Mr. Merriweather, and you made certain references to Mr. Trainer including, "It is evident that Trainer is playing with the U. S. Lines to gum up that award on the JOHN ERICSSON?"

Do you recall writing that? A. I do.

Q. Did you send a copy of that letter to anybody but Mr. Merriweather? A. I don't have any recollection of sending any copy to anybody but Mr. Merriweather.

Q. Don't you have any recollection of having been brought before the National Executive Committee for writing this letter? A. Yes, sir.

Q. But you don't recall whether you sent copies of it to anyone else? A. I don't recall it, no, sir.

Q. Wasn't that matter discussed when you were brought before the National Executive Committee? A. There were copies of that letter to other locals, yes, sir, on the Pacific Coast.

Q. You remember that? A. To Seattle, Portland and San Pedro.

Q. And Mr. Merriweather brought you before the
361 National Executive Committee, didn't he? A. Yes, sir.

Q. And you were forced to retract this letter, weren't you? A. I wasn't forced to. We agreed to retract it. In the discussion we agreed we would retract the letter.

Q. Did you agree to write these locals to whom you had sent copies of this letter? A. I did.

Q. You just testified you didn't remember sending any copies? A. I corrected that. We did send it to the West Coast locals.

Q. Haven't there been a number of other cases similar to this case where you have circulated letters regarding the business manager of the union? A. We always try to circulate letters among the people involved in anything of this nature.

Q. And when you put the union stamp on the letter is it required that that letter be read in open meeting, according to the rules of the Association? A. Not necessarily.

Q. It is supposed to be? A. It does require that it is union business.

Q. It is union business to be taken up with the local
362 members? A. If there is anything to be passed on by the local, yes.

Q. When you put that stamp on it you know the likelihood is that it is going to be read before the members of the Association? A. Not necessarily.

Q. There is a pretty good chance it will, though? A. If it is anything that has to be handled before the Association, yes, it would have to be read before acting on it.

Q. It is the way you present your views before the whole membership of the Association, is that right, when you put the stamp on it? A. I wasn't presenting my views before the entire membership.

Q. You put the stamp on this letter, didn't you? A. Yes.

Q. You put the stamp on the letter of July 27th, didn't you? A. Yes, sir.

Q. Now, Mr. Blake, the case having reached a deadlock prior to December, 1942, was submitted to the Maritime War Emergency Board, a government body; is that correct? A. That is correct.

Q. And from December, 1942, until the case was
363 finally decided favorably to the union it was continuously before a government body, wasn't it? A. Yes, sir, it was.

Q. And the delay that took place in the decision of the case was particularly because of the number of other cases which those government bodies had to handle during these times; isn't that right? A. Yes, it was.

Q. Did Mr. Trainer cause that delay? A. No, he couldn't have.

Q. Was there any way in which he could have caused that delay? A. No, there is no way he could.

Q. Where are these boards located? A. Who?

Q. These boards before whom this matter was pending.
A. They are located here in Washington.

Q. Washington? A. Yes, sir.

Q. And you are in charge of the Washington affairs of the Association, aren't you, you and Mr. Hogan? A. Not necessarily; not all of them.

Q. You are with the National Association? A. Yes, sir.

Q. And matters that are pending before local
364 boards here, particularly this matter while it was here in Washington before the Board, that was your job to follow it, wasn't it? A. Yes.

Q. Isn't it a fact you didn't know that the United States Lines Company had applied for a rehearing until sometime

after the application was made? A. We didn't know that.

Q. You didn't know it? A. No; we wasn't notified of it.

Q. Wasn't it your business to find out what was happening to your cases? A. Our case had been disposed of and an executive order had been issued on it, and we supposed that was the end of it.

They knew that in New York the next day, that there was an appeal taken, but we wasn't notified of it.

Q. They knew the next day in New York? A. Yes.

Q. Who knew it? A. The United States Lines that made the appeal.

The Court: I don't see, Mr. Tumulty, that that has anything to do with the case.

Mr. Tumulty: The witness implied on direct examination that the delay was in some way due to the lack of
365 cooperation of Mr. Trainer in this matter.

The Court: He has said a moment ago that Mr. Trainer couldn't have caused any delay, so that is settled.

* * * * *

By Mr. Tumulty:

Q. Are you familiar with the magazine known as the Pilot? A. I have seen—I saw a copy of that about three years ago, I think, was the last copy I ever read or tried to read.

Q. You know what it is, don't you? A. I know that the National Maritime Union publishes a paper called the Pilot.

Q. You know it has a wide circulation? A. It has, as a propaganda organization, it has wide circulation.

Q. Among laboring men in the maritime field? A.
366 Amongst the unlicensed personnel that belong to the maritime union.

* * * * *

Re-direct Examination

By Mr. Sothoron:

Q. Mr. Blake, will you explain if this was the paper you wrote that you thought you were identifying at the time you were asked that question by Mr. Tumulty? A. Yes, sir.

Q. And this is another statement of facts, or brief, or whatever you call it? A. Yes, sir, that is right.

Q. So that your answer to those questions as to whether you wrote that document that he was talking about is incorrect, and you want to correct it to that extent? A. That document was prepared by the War Shipping Administration as a joint statement of facts, which was submitted to the Association and to the United States Lines as an agreed upon statement of the matters which were in dispute.

367 The Association agreed that those were, but as far as I know the United States Lines Company never agreed that those were the facts which were in dispute, but we went on and prepared our briefs and made our own statements and they were before the Board substantially as in that statement there.

Q. In the examination there were telegrams read here in which it seemed that Captain Devlin stated that the gross tonnage had not been recognized and was not recognizable as a means of determination of the basic pay on the ships.

I also notice in the telegram that later that was retracted and that they do recognize it.

Who caused that change, Mr. Blake, if you know? A. Mr. Hogan and I took an appeal from that to the Administrator of the War Shipping Administration and called it to his attention that the Maritime Commission had always recognized power tonnage, and they called Captain Devlin in and made him retract that statement and issue a letter to the effect that he was in error.

Q. Did Mr. Trainer have anything to do with that? A. Nothing whatsoever.

Mr. Sothoron: That is all. Thank you, Mr. Blake.

The Court: Is that all, gentlemen?

368 Mr. Tumulty: Your Honor, I would like to have an opportunity to examine these papers before the witness leaves the stand.

* * * * *

Re-cross Examination

By Mr. Tumulty:

Q. Referring to this document which you prepared, do you recall having written this in January, 1943? A. I do, yes, sir.

Q. Referring to the statement in the November 6th letter, concerning which you were cross examined this morning, you make a statement here:

“That part of the letter which states ‘that the War Shipping Administration does not recognize power tonnage’ is a deliberate misstatement.”

Did you make that statement? A. That is right, yes, sir.

Q. And that is the letter in which mention was made of Mr. Trainer’s name, the letter from Mr. McCarthy, isn’t that correct? A. What is that question?

Q. That is the letter in which mention was made of Mr. Trainer’s name? A. Yes, sir.

Q. You said you relied upon that letter? A. Yes, sir.

* * * * *

369 **Herbert J. Devarco**, a witness on behalf of the defendant,

* * * * *

Direct Examination

By Mr. Cook:

Q. What is your name? A. Herbert J. Devarco; 51 Chambers Street, New York City.

Q. What is your occupation, Mr. Devarco? A. I am an attorney at law.

Q. Have you ever had any connections with labor associations, unions, or groups? A. I have been engaged in the practice of law, and particularly in the maritime field, and with pertinence to labor relations since, I think, 1932, in the City of New York, and during that time have represented the Associated Marine Workers, Towboat Employees; the American Radio Telegraphers Association, before it became the American Communications Association.

I formed the merger of the Ocean Association of Marine Engineers with the Neptune Association of Deck Officers into what is now the United Licensed Officers.

I am associate counsel of the United Marine Division on Admiralty matters, the Towboat Employees, and am counsel to the Deck Scow Captains Union affiliated with the International Longshoremen's Union A. F. L.

Q. And you have appeared before the National Labor Relations Board? A. Yes, I have appeared before the National Labor Relations Board since its inception.

The first case that—

The Court: I think that answers the question.

By Mr. Cook:

Q. Mr. Devarco, in your experience in labor circles would you be able to give us a definition of what you understand or what is understood in labor circles by "back-door agreement?" A. My understanding, in view of my experience with labor negotiations and negotiations of labor agreements and contracts, is that a back-door agreement would be an agreement which was not the result of the collective bargaining process back and forth, and if I may elaborate: By that I mean that in the ordinary sense of the word a collective bargaining agreement is the result of conferences between the employer and employee, or their respective representatives; the presentation of a proposed agreement to the employer by the union; a counter-agreement by the employer and the filling in back and forth,

giving and taking on terms and provisions of an agreement, until finally an agreement is reached, or is not reached, whichever the case may be.

As distinguished from that type of an agreement, a back-door agreement is an agreement where the representative of labor goes into the employer and is given an agreement without all of the preliminary fighting back and forth about terms and provisions, very often to circumvent—not circumvent—very often to get the agreement over with because of possible intervention on the part of other labor organizations, because we have so many different types of organizations in the licensed officers' field.

Q. Would you say that when someone made a back-door agreement he had done something dishonest or dishonorable? A. Not at all.

Q. It doesn't imply that in your opinion? A. Not at all.

Q. Mr. Devarco, do you know the plaintiff in this case, Edward P. Trainer, business manager of local 33? A. Yes, I guess I have known Mr. Trainer about ten years, or thereabouts.

Q. And you know people who know about him in 372 New York City? A. Oh, yes; I know dozens who know him.

Q. Do you know his general reputation in that community? A. In the community?

Q. Yes. A. With relation to what?

Q. With respect to labor organizations and labor activities? A. Yes, I know his reputation.

Q. Would you tell us what your opinion is of his reputation, or what his reputation is in labor circles in New York City?

The Court: I think you understand it isn't what this witness' opinion is. At best it could only be what his reputation is.

Mr. Cook: I corrected myself and said, "What his reputation is." A. Mr. Trainer is—

The Court: I think perhaps you ought to limit it. Do you mean, Mr. Cook, as to his integrity, or lack of it; honesty and integrity, or lack of it; his ability, or lack of ability?

Mr. Cook: That is right; his integrity, or lack of it; his ability, or lack of it, and his reputation as a representative of labor unions that he purports to represent, because
373 he has placed that in issue.

Mr. Tumulty: I think it should be limited to his character for honesty and integrity, your Honor.

The Court: I should think so. I just don't know what the purpose of the question is.

What is your purpose, to attack his credibility, or what?

Mr. Cook: Partly. Mr. Trainer has testified that he alone built up this organization,—

The Court: If it is to attack his credibility then you should put the proper question, namely, as to what his reputation is for truth and veracity, and whether he can be believed on oath.

Mr. Cook: I don't want to limit it to his veracity. I want to attack his statement that he alone built up this organization.

The Court: You can't do that by reputation. That is a factual matter that you will have to prove by those who know the facts.

Mr. Cook: I think we should prove, if your Honor please, that his reputation as a representative of Local 33—

Mr. Tumulty: I think perhaps we should approach the bench for a statement of this kind.

The Court: Very well.

(Whereupon, the following proceedings were had at the bench, and out of the hearing of the jury):

374 Mr. Cook: Mr. Trainer, in his direct examination, laid particular stress on the fact that he built up this organization from a membership of 400 in a short space of five years, to 2,500 members.

He extolled himself at great length about what a big man he was in labor circles.

I thought by this witness, and I offer this testimony as a proffer to that end, that Mr. Trainer has the reputation among laboring men with whom he deals in New York City as rather being a disadvantage to the men he represents, rather than an advantage.

That is his general reputation among the people with whom he deals, with members of the National Labor Relations Board, ship owners and the men who work on ships, the engineers whom he claims to represent.

I think that is very vital in this case, and that is the reason why I am very insistant on proving this point.

Mr. Tumulty: I think he is limited as to honor and integrity, your Honor.

Mr. Cook: In this case his character and his reputation are directly in issue.

Mr. Tumulty: The libel attack is on his honor and integrity.

Mr. Cook: You claim on his reputation as a business representative.

375 The Court: You claim through his integrity and his ability that he gained a high reputation among the members of this union and among the union field generally, the maritime union field.

Mr. Cook: That is right. He has placed that directly in issue.

The Court: And that this reputation is affected by the publication of this libel.

Mr. Tumulty: Then I object because this man isn't qualified to testify.

The Court: That is another matter, but I think the reputation is in issue, isn't it?

Mr. Tumulty: The allegation is made, as I recall it, as to his ability.

The Court: He, in effect, testified it was as to his reputation, and two or three of the gentlemen whom you called from his union also testified, didn't they?

Mr. Tumulty: They testified as to his character for honesty and integrity, but they did not testify to his reputation for ability. They testified to his honesty and integrity.

Mr. Cook: Yes, they did.

Mr. Tumulty: My questions were phrased as to his reputation for honesty and integrity.

The Court: I think your questions went farther
376 than that.

Mr. Cook: They did. I will be glad to check the record with you.

Mr. Tumulty: The effect of our testimony may have gone further.

The Court: Yes. At any rate your claim for damages would be predicated in some degree upon damage to his reputation, wouldn't it?

Mr. Tumulty: That is correct.

The Court: So I assume that the reputation is a thing in issue. The higher a man's reputation the more it may be damaged—not necessarily.

I think the matter of reputation as a union business manager and leader is a matter in issue and might be dealt with. Whether or not these questions are appropriate to that end—will you read the last question?

(Whereupon, the last previous question was read by the reporter as above recorded.)

Mr. Tumulty: That is not limited in any way.

The Court: I think if you asked what his reputation as a labor leader and worker is, among the circle of maritime union workers in New York,—would that meet it?

Mr. Tumulty: That would certainly be much less objectionable, in my opinion.

I believe that is a proper question, your Honor.

377 The Court: Something along that line.

Of course he should qualify himself along that line to speak and show that he is able to answer the question.

Mr. Cook: I asked him if he knew other people who knew him in labor and maritime circles, and if he knew a great many of them.

The Court: Whether or not he knew what Mr. Trainer's reputation is as a labor leader and worker in labor circles.

Mr. Tumulty: Your Honor, may I make this observation, that in offering such testimony they are contradicting the defendant's own testimony.

He testified that he was an effective labor organizer and did a good job.

Mr. Cook: That is a matter for argument.

Mr. Tumulty: Can they contradict their own testimony?

The Court: That is quite inconsistent.

As a matter of fact, doesn't it go beyond the pre-trial proceedings, and your plea—I don't know about your plea—but in the pre-trial proceedings you set aside the defense on which you are going to rely as a fact, that although the letter was written it did not have the approbrious meaning which is attributed to it by innuendo.

Mr. Cook: That is right, and yet we deny all the other allegations of the complaint, among which was his reputation as a business agent in New York City.

378 Mr. Tumulty: You are offering this solely in mitigation of damages?

Mr. Cook: No, not in mitigation of damages.

The Court: In exclusion of damages.

I wouldn't be sure that the pre-trial proceedings would exclude this, it is questionable, but it doesn't seem to be very definite.

It is inconsistent with the position you took in your opening statement and the position which Mr. Blake himself takes upon the stand.

Mr. Cook: I don't think it is inconsistent, for this reason, that Mr. Blake himself has always had the kindest feeling for Mr. Trainer; he has always taken up for him when others condemned him, in spite of the fact that he had a bad reputation, in spite of the fact he wasn't as good a business agent as he claims to be, and still Blake takes up for him.

The Court: Well, who is as good as he claims to be?

Mr. Tumulty: I think the facts speak for themselves.

The Court: I suppose, gentlemen, that as long as the matter of damages depends upon the alleged tendency of this letter to injure that reputation, it is in issue, and that he might offer evidence tending to prove a bad reputation, if he can.

Whether or not it is consistent with the rest of his case, I doubt if that would be sufficient for me to exclude
379 it.

Mr. Tumulty: Isn't the jury, unless there is some expression as to the limiting nature of this testimony, apt to get the impression that because of this testimony that he might have entered into a back-door agreement? They are not contending he did enter into a back-door agreement.

The Court: No. I think as the case shapes up it would only be relevant as arguing that after all this man hasn't got quite the reputation which he claims to have, and therefore he couldn't be injured as he claims to be.

Mr. Cook: That's all.

The Court: Or to the extent that he claims. It goes to the matter of damages, and only that.

Of course you have a perfect right to argue the inconsistency of their position about that. That is a matter for comment in the argument.

I think so far as my ruling is concerned it will have to be as I have indicated.

Mr. Cook: As to his reputation in labor circles?

The Court: Yes.

Mr. Cook: And confine it to that?

The Court: Yes, along the lines of my question.

(Whereupon, the following testimony was taken and proceedings had, in the presence of the jury:)

By Mr. Cook:

380 Q. Mr. Devarco, will you state what the reputation of Mr. Trainer is in New York City among maritime labor officials and in maritime labor circles? A. His reputation, as I know it—

The Court: I think that is a little broader than I suggested—with respect to his ability and fidelity as a labor leader and organizer.

By Mr. Cook:

Q. Limit that to his ability and fidelity as a labor leader and as a labor organizer. A. Frankly, your Honor, it can't be answered particularly directed to those two words.

My experience covers the whole field of relations with him, in particular proceedings—

The Court: It isn't your experience with him. It is your knowledge of his reputation as known by other people.

The Witness: As I have observed, your Honor?

The Court: That is what I am trying to point out. You are not asked to express your own opinion formed from your own experiences with him. You are asked, first, whether or not you know his reputation among union circles and in the maritime field in New York.

The Witness: I can answer that.

The Court: Do you or do you not know it?

The Witness: Yes, I do.

381 By Mr. Cook:

Q. Then what is that reputation? A. He has the reputation of being an irascible, tempestuous individual who is always getting into fights and arguments.

Mr. Tumulty: That isn't responsive, your Honor.

The Court: I think that goes too far.

By Mr. Cook:

Q. Just state in a general way his reputation.

The Court: Let me put the question and see if you approve of it, Mr. Cook, and you answer it yes or no, please, Mr. Witness, if you can, of course.

The Witness: Yes, sir.

The Court: Do you know his reputation among labor circles in New York with reference to ability and integrity as a labor leader and organizer?

The Witness: Yes, I do.

The Court: Is it good or bad?

The Witness: I am sorry, your Honor, but it can't be answered in "good or bad".

Mr. Tumulty: I think that is the answer, your Honor, if he is unable to answer it and doesn't know.

The Witness: I do know.

The Court: Pardon me. I don't think in dealing with this matter of reputation, as testimony, it is generally regarded as proper for a witness to characterize in his own descriptive way the reputation of an individual. He speaks for the group—

Mr. Cook: That is true.

The Court: —the Union, and he says he knows his reputation. It has to be expressed in a word or two. Otherwise you necessarily get into individual views of this man and that man and the other man, and it is a dangerous field, not only because it opens up a broad field of collateral testimony but also because of its very nature it is quite dangerous.

I doubt if I would have the right to permit the witness to go any farther than I have indicated by my question.

Do you agree with me on that?

Mr. Cook: I agree with you on that, if your Honor please, and that is the way I framed the question in the first place.

The Court: I think you should limit it, and if the gentleman feels he is not able to answer it I think it indicates that he is not properly qualified to testify to his reputation.

Mr. Cook: May it please the Court, may I make this statement?

The time is drawing late, and I don't think this question is of sufficient importance to waste any more time
383 going into it, so I will withdraw the last question.

* * * * *

Cross Examination

By Mr. Tumulty:

Q. Mr. Devarco, how long have you practiced law? A. 17 years.

Q. I understood you to say that you represent the ULO and the ILO? A. I do not represent the United Licensed Operators any more.

Q. You did represent them at one time? A. I represented them—the last Labor Relations case I handled for them was the—

Q. You said you organized the ULO? A. I was instrumental in the formation of the merger.

Q. How about the ILO? A. That is the International Labor Office. This union I represent is a local of the I. L. A.

Q. The ILA? A. International Longshoremen's Association.

Q. What are the two organizations, the ULO and the ILA? A. United Licensed Officers is a vertical type of organization representing both deck and engine room
384 licensed personnel on ocean going vessels.

The Deck Scow Captains union, or Barge Captains on harbor craft in inland waters, or coastwise—

Q. That is the ULO? A. That is the Deck Scow Captains of the ILA.

Q. I see. A. The previously mentioned one was the United Licensed Officers who were both deck and engine room officers, and a competing organization both to the National Marine Engineers Beneficial Association and the Master Mates and Pilots, the Deck Officers' Union.

Q. That is the point I want to bring out. It is a rival organization to Mr. Trainer's organization. A. That is so.

Q. They operate in the same territory, don't they? A. They have agreements with certain lines. I think Local 33 has agreements with other lines.

Mr. Cook: May it please the Court, at this point may I ask counsel if you are challenging the qualifications of this witness to testify?

Mr. Tumulty: I am not challenging his qualifications, but I would like the jury to know these facts that I am trying to bring out so they can weigh his testimony.

Mr. Cook: Then you are attacking his credibility? Is that the object of the question? If it is, I have no
385 objection.

Mr. Tumulty: The reason I am asking the question is to—

The Court: It goes to the possible bias. I think the question is proper.

Mr. Tumulty: I am not attacking his credibility, but I would like to show he is, maybe a little bit one way or the other.

Mr. Cook: If it shows bias it is perfectly proper.

By Mr. Tumulty:

Q. Isn't it true each of those unions, the ULO and ILA have opposed Mr. Trainer's union before the National Labor Relations Board? A. No, it is not so. I know the ULO has consistently opposed him since its formation and he has opposed it, but as far as the Deck Scow Captains Union is concerned they have no connection whatsoever with Mr. Trainer, because they are men employed on non-propelled boats who don't come within his jurisdiction, nor does his union come within theirs.

Q. Did you come here to testify voluntarily? A. I was requested to testify by Mr. Cook. He said that my name had been given to him by Eleanor Herrick, formerly the Regional Director of the National Labor Relations Board, as being a person—

386 The Court: I wouldn't go into that.

Mr. Tumulty: That is hearsay and I ask that that be stricken, your Honor.

By Mr. Tumulty:

Q. Are you familiar with the Pilot? A. Oh, yes; surely.

Q. Did you ever hear of the term "back-door agreement" meaning a crooked agreement? A. Well, I have never

known it as a crooked agreement, and frankly the terminology used in the Pilot may not accord with my terminology.

Q. Is that because you are a lawyer and not a union man?

A. It is because I am not indulging in that propaganda whereas the Pilot is.

Q. Is it true that you and Mr. Trainer were on opposite sides of the fence in numerous proceedings before the National Labor Relations Board? A. Undoubtedly.

* * * * *

387 **James P. O'Kane**, a witness on behalf of the plaintiff,

* * * * *

Direct Examination

By Mr. Tumulty:

Q. Mr. O'Kane, you testified that you were present at the meeting on July 27, 1942? A. I was.

Q. Was any claim made at that meeting by any representative of the United States Lines, in the presence of Mr. Hogan and yourself, that Mr. Trainer had made a verbal, informal agreement, with the United States Lines Company before the JOHN ERICSSON sailed? A. No, sir.

Q. Did any official of the United States Lines Company claim that they had talked to Mr. Trainer and advised him of the wage scale they were setting up on that vessel? A. No, sir.

* * * * *

388 **Edward P. Trainer**, the plaintiff,

* * * * *

in rebuttal,

* * * * *

Direct Examination

By Mr. Tumulty:

Q. Mr. Trainer, did you hear Mr. Blake's testimony? A. Yes, sir.

Q. Did you hear Mr. Blake testify in substance that you had failed or refused to cooperate with Mr. Hogan in connection with the negotiations that the national officers were carrying on with the United States Lines Company? A. I heard him say so, yes.

Q. Was that a true statement? A. No; absolutely untrue.

Q. Did you cooperate to the best of your ability in every way in connection with those negotiations? A. Absolutely.

Q. Was there ever anything you were asked to do that you didn't do? A. Positively not.

Q. Can you tell us whether there has been any rivalry between the ULO and the ILA, in your territory, and your union? A. Just to get this out of the way, the ILA 389 he was talking about is the Deck Captains. He doesn't represent the ILA that we fight. That section is in the railroads; we fight them all the time and they fight us, but the ULO we fight all the time.

They were organized by Mr. Devarco and were officered by Mr. Todd and Captain Milligan. I would say that at least 30 hearings before the Labor Board Mr. Devarco represented them and I represented the national M.E.B.A., and we beat them from hedge to hedge until we got in such condition that even he had to quit the organization; he couldn't make a living out of it.

* * * * *

Cross Examination

By Mr. Cook:

Q. Mr. Trainer, you just said, in answer to a question, that you cooperated in every way on this wage scale agreement. A. Yes.

Q. And the negotiations on the JOHN ERICSSON? A. Yes, sir.

Q. Exactly what did you do? A. First of all, when I got the telegram—let me tell you now—you asked me to tell you and I am going to tell you.

On June 15, as soon as I got the telegram, I got in touch with the Commissioner and I said, "What is the JOHN ERICSSON?" He said, "The JOHN ERICSSON, that is the KUNGSHOLM."

So I went to work right away and I called Hogan
390 and told him I had made no agreement for the so-called JOHN ERICSSON. Then the first letter he sent back was, could we send him engineers.

Q. Just a minute; we have been through all that. I want to know what you did in relation to—

Mr. Tumulty: He is responding to the question, your Honor. I think he should be permitted to complete his answer.

The Court: Yes, but can you summarize it, Mr. Trainer; not so much the conversations you had back and forth between the Washington office and yourself, but the actual things that you did looking to cooperation and help in the matter.

Mr. Cook: I will frame the question a little differently, and perhaps he can answer it.

By Mr. Cook:

Q. After the conference you had on July 27, in New York City, with Mr. Hogan, Mr. Blake and Mr. McCarthy, outside of that and the letter you wrote criticizing the statement of facts what did you do specifically to get this decision of the War Labor Board? A. Well, the War Labor Board was here in Washington.

While this particular agreement for the JOHN ERICSSON was being made by the national officers I signed agreements for 30 companies, putting 300 ships under contract.

Q. What did you do with reference to this union wage negotiation agreement and hearing at the time you
391 got the decision from the War Labor Board?

From the time of the conference on July 27 to the final decision of the War Labor Board, what specifically

did you do to get that decision? A. Everything the national officers asked me to do I did.

Q. And what was that? A. Everything. I couldn't tell you all.

Q. Could you name one thing you did specifically? A. They wrote back and asked me to contact McCarthy again, and I contacted McCarthy again.

I come back again and told them then and told them over the phone there was a deadlock here, "You have got to take it to the War Labor Board."

I couldn't put that before the War Emergency Board. That had to be done by the two national officers.

Q. I know that, but tell me anything that you did. A. Anything the national officers asked me to do I did.

Q. In other words they did it all? A. No.

Q. And asked you to do nothing? A. No; I did as much as they did except to appear at the Board hearings down here.

Q. Will you name them? A. I went to the library, I spent five and one-half days in the library getting the—

Q. (Interposing) That isn't responsive to my
392 question.

Mr. Tumulty: It is, your Honor; I object to that. This is what the man did.

The Court: I should think that would be responsive.

Mr. Cook: He has already testified—

The Court: But you are asking him.

Mr. Cook: I am asking him what he did in relation to this hearing.

Mr. Tumulty: Which hearing?

Mr. Cook: From the time of that conference on July 27 to the time of the final decision of the War Labor Board, I want him to name any one specific thing he did to get that decision.

Mr. Tumulty: Your Honor, there was no hearing until after this letter was written. This hearing was on September 13, 1943. There was no hearing prior to that time.

The Witness: That was a troop ship that moved 20,000 troops into Casablanca from November to February, and I went down there myself, and I said to the men, I said, "Here, you fellows have got to stay on this ship; everything will be settled when the time comes around, but Government boards take a longtime, and Government boards act slowly," and the main thing was to uphold the reputation of the union and to see that those soldiers went over to Africa. That was the main thing.

I went down on the ship myself, and I had the men
393 in my room, and I did everything to keep the men satisfied. I had the ship on my hands in New York. These Government boards are in Washington. I will do everything I can with the ship in New York, but when it come up to Washington here, and to interference with these men—there is such a thing as leaving the Government boards to these two men.

I come to Washington here before the Railway Labor Act. I went to Baltimore on the National Labor Relations Board. Show me what I can do or what I didn't do that I could do. You can't do it.

Q. I merely asked you to state one thing you did to assist in those hearings.

Mr. Tumulty: He answered that question. He stated several things he had done. It hasn't been shown there was any hearing, your Honor.

The Court: I think perhaps it has gone far enough.

Mr. Cook: I will be satisfied with that. That is all.

Redirect Examination

By Mr. Tumulty:

Q. Do you know whether there was any hearing held prior to the time Mr. Blake sent this letter out? A. Yes. What kind of a hearing?

Q. Before a Government board, where the parties appeared and argued this matter. A. No, I don't think there was any.

394 Q. Do you know as a matter of fact there was not?

A. I understand written statements went into the first hearing before the board.

Q. That is right. That was the statement, a copy of which you received from Mr. Hogan. A. And I corrected it.

Q. And you called attention to two errors? A. Yes.

Q. And those two errors were called to the attention of the Maritime War Emergency Board?

The Court: That has been gone over.

By Mr. Tumulty:

Q. Have you ever held a ship up since the war? A. Never.

Mr. Tumulty: That is all.

Mr. Cook: No further questions.

* * * * *

Motion for Directed Verdict.

Mr. Cook: I would like to renew my motion for a directed verdict on the whole case, for the reasons stated at the conclusion of the plaintiff's case.

395 The Court: The motion will be denied.

* * * * *

Mr. Tumulty: If your Honor please, I believe the law is clear that the burden of satisfying the Court that a privileged occasion exists is the burden of the party that raises the defense, and that being the case I would suggest that Mr. Cook proceed first, and then I will answer.

The Court: What is your idea of the matter that makes it privileged, Mr. Cook?

Mr. Cook: I think it is well settled, if your Honor please, that a communication or defamatory words addressed from one member of a group, a church society, labor union, political group, any particular group, if those words of that letter are addressed from one to another in that group, and relates to the business of that group, then it is qualifiedly

privileged. In other words, they are justified in making that statement, and that is the specific holding in the case of Caldwell against Hayden, to which I referred your Honor when asking for a directed verdict. It is in 42nd Appeals.

I think that case is squarely in point and I would be willing to rely on that.

The Court: I will examine that case.

Mr. Tumulty: If your Honor please, we contend that there is no such sweeping rule of privilege as the defendant contends for.

The doctrine of privileged communications is based on public policy.

The idea is not to give anyone a license to libel or defame another. The idea is to protect people in certain relationships in society, where it is necessary for them to act in good faith but necessarily with correct and complete information.

For example, if someone should call me on the telephone and ask me for a reference for a servant I could state that that servant, in my opinion, was a thief, even though I couldn't prove it, and provided I made the communication only to the person who asked me, and that person had an interest in the subject matter, it would be proper for me to make the statement and it would not be libelous, and I would have a defense against that servant, if she brought a suit against me for libel.

In the same way, if men are members of the same union, and they are in attendance at a meeting of the union at which some piece of union business is under discussion, they are protected by a similar privilege.

On the other hand, if there is no such occasion—if I happen to have a servant and I am at a bridge club and someone who has no interest in that particular servant, in employing her, asks what I think of her character, and there are a lot of other people present in the room who have no interest in her, I wouldn't be protected

because of the relationship of servant and employer. If I made a statement that she was a thief I would be liable for damages unless I could prove the statement.

We concede that if this statement was made at a union meeting at which, for example, Mr. Trainer's qualifications were the subject of some action that was going to be taken at the meeting affecting the common interests of the union members, that it could be very well contended and it would be conceded by us that in that situation there was a qualified privilege, and unless we could prove that the defendant in making the statement was actuated by ill feeling toward the plaintiff we would not be able to recover.

This is not that kind of situation at all. The facts as to the occasion of the utterance of the defendant were not disputed, because it is shown that the plaintiff made a protest on behalf of some members of his local against an advertisement which was carried in the publication of which Mr. Blake is the editor, and Mr. Blake, through Mr. Hogan, requested him to give him the names of the members of his organization who protested in order that he might write to them and explain why the advertisement was carried.

What did Mr. Blake do? When he got the list of names he wrote a letter in which he stated his reasons for
 398 carrying the advertisement. That portion of the letter would be properly protected by qualified privilege, if there were libelous statements in it, if the libelous statements were addressed to the parties who made the protest. However, that was not done.

In addition to doing that he brought in a matter that was entirely irrelevant to the issue and which was not under discussion, which was not the subject of any action that these men could take in the matter, and which was a subject that the War Labor Board had under consideration at that time and there was nothing these men could do about it. There was no action pending; there was no action proposed to be taken.

In order to do a greater injury, or to get wider publicity, he sent it out not only to the men who had protested but he

sent it also to men who had no knowledge of this situation that had originally arisen between certain members of M.E.B.A. 30 and the editor of the paper.

So our contention is that this is not a situation in which just because men are members of the same organization, whether it be the same church, the same club, or the same labor union—they don't have any license to libel each other in a freehanded manner. They are under the same rules as everybody else, except in a case where the interest is the interest of the public and not the interest of the individual. It is the overriding interest of the public in permitting a person under a particular set of circumstances to communicate to other people something that he believes, even though he can't prove it, that provides for the privilege.

Furthermore, not only is there a rule that there must be a common interest in the subject matter under discussion, but the persons must be pooling together their efforts to arrive at a decision of some importance, whether it be the employment of a servant or acting on a pending measure before a house, but it must be shown that there was not undue publicity given.

In other words, if you exceed the privilege you lose it, and the Court in deciding whether it was a privilege must decide whether the privilege was exceeded.

Conceding that he had a privilege as applied to the group who protested, he sent this out broadcast to everybody. He didn't have any right to do that.

The Court: What does the evidence show?

Mr. Cook: It doesn't show that he broadcast it to everybody.

Mr. Tumulty: He sent it to the convention representatives and to the secretaries and business managers of the subordinate associations. The record shows the number, your Honor. There are over 20 of them, I believe, and those men hadn't protested about the advertisement at all. So far as I know they never even saw it.

400 If I communicate a statement to somebody who has a right to ask for a reference, in the presence of a lot of people who have no interest in it, I lose the privilege. It is the privilege that must be carefully guarded.

The Court: Your point then is two-fold:

First, that it was not at all relevant to the protest which these men had made with regard to the advertisement—

Mr. Tumulty: It is three-fold, your Honor.

First, that the subject of the ERICSSON agreement was not a subject which was before the union in any way. It was a matter that was before the Government. Nor was Mr. Trainer before the union in any way. He wasn't up for election to office. He wasn't making any proposal for action by the union, so it was not an occasion when there was any privilege used to make a statement about Mr. Trainer or about the United States Lines agreement.

I think we must make a distinction between that and something which he had a right to do, as editor, that is, to write them about the advertisement.

It is close to the second question, which is the one of relevancy.

He had a privilege to write to them and explain his ad, but he didn't have any privilege to put irrelevant things into that. This is irrelevant. Therefore, he loses
401 the privilege. He loses the benefit of the privilege that might otherwise cover, if he mentioned anything that was relevant to the subject under discussion.

The third point is, he lost it when he exceeded it by sending a copy of this letter to many people not interested in this letter.

It was his duty to run the paper and to run it properly, and if anybody objected he had a right to tell them why he acted as he did.

Mr. Cook: May it please the Court, I agree with counsel that if he had sent this letter to someone who had no interest in this matter, like talking to somebody in a bridge club, certainly that isn't privileged. We have no argument on that point.

Here he wrote a letter in response to a protest on an advertisement. It was in direct response. He sent that letter only to the members who sent that protest and to the business managers and officials of the same union. It was on a union subject.

The Court: The same local?

Mr. Cook: No; locals throughout the country, to all the officials of all locals because they were all interested in the same subject. It was a matter of union business.

The Court: There isn't any evidence that the protest had been published and known to others, except the
402 ones who made the protest.

Mr. Cook: There is no evidence.

Mr. Tumulty: There is no evidence.

Mr. Cook: Counsel freely admits that if the defendant in this case had got up in a union meeting and made this statement it would have been privileged.

Mr. Tumulty: I didn't make that statement. It would depend on what the occasion was. The mere fact he was in a meeting wouldn't give him any such privilege.

Mr. Cook: I thought you made that statement.

Mr. Tumulty: No. I said if there was a matter pending before a meeting which affected Mr. Trainer, or this agreement he could say it.

Mr. Cook: Suppose this matter was brought up at a meeting—

Mr. Tumulty: Then we would have a different case.

Mr. Cook: And he concedes would be privileged, then I say by the same argument that he concedes that, then this subject is brought up in response to this letter of protest.

The Court: But what is in the letter of protest that brings up the subject of the ERICSSON?

Mr. Cook: It doesn't have to bring up the subject of the ERICSSON.

The Court: Do you mean that this protest by these 18 men against an advertisement in the official organ of
403 the union opened up any and all union subjects of

every kind and character and brought into discussion the character of individual officials of the organization?

Mr. Cook: We contend he didn't bring in the character of this official.

It was just as if he had gotten up in the meeting and he said, "I didn't do anything wrong by publishing this advertisement; you did wrong by making this protest."

He looked up at the time and saw that this Diesel Engineers Association was not a labor organization. He says in his letter that he looked over their constitution and by-laws and that it was just a social organization, and then he goes on to say, "You are protesting about everything the national office does, when you are just trying to make this back door agreement you have with the JOHN ERICSSON stick."

I think if he had made those statements in an open meeting, as counsel suggests, there wouldn't be any criticism of them.

Mr. Tumulty: There would be this, your Honor. There would still be the question of relevancy. There would still be the question of good faith.

For instance, as I said, the privilege is based on public policy because the interest of everybody is greater than the interest of the person who is going to be injured.

If the fact that I come into a union meeting and
404 make a statement about something pending before
the union means that somebody in that hall can libel me about anything in my whole life, then where is the public policy? I wouldn't want to get out and open my mouth.

Mr. Cook: On a union matter?

Mr. Tumulty: On a union matter. You can attack me on anything that is relevant to the subject, but if it is not relevant, the fact that it is in a meeting and that the matter is before the meeting, wouldn't protect you in any way. You would have to show not only the privileged occasion but also relevancy.

Mr. Cook: You mean that if you got up at any meeting you would have to confine yourself strictly to the matter?

Mr. Tumulty: If you make a statement that is libelous then you are liable.

The Court: If in any reasonable way it seems to be germane to the subject which elicits the same, of course it would be privileged.

Mr. Tumulty: I concede that.

Mr. Cook: And we think this is germane and we would like to ask the Court to instruct the jury to that effect.

The Court: I won't pass on it now.

We will take a recess until tomorrow morning at 10 o'clock.

* * * * *

408

Charge to Jury.

Proceedings

(The following proceedings were had out of the presence of the jury.)

The Court: Gentlemen, I have reached this conclusion, that the statements complained of in the complaint as libelous are not of a privileged character. The result, I think, is that the real issue in controversy is as to the meaning of the words used, whether they have the infamous and injurious meaning which is claimed by the plaintiff, which he, of course, must prove by a preponderance of the evidence, or whether they have the harmless and inoffensive meaning which Mr. Blake, the defendant, claims they have.

That, I think, in view of my ruling as to privilege, is the real issue in the case.

Do you agree with me on that, assuming my ruling is correct as to privilege?

Mr. Cook: I agree with you, in view of that ruling, that that is the remaining issue in the case. I would like for the record, if Your Honor please, for you to specifically deny my request for instructions as to qualified privilege.

The Court: Yes, I will, and I suppose it may be understood also that you renew your motion for directed verdict.

Mr. Cook: Yes, I did yesterday.

The Court: That will be denied, and then we will deal with these prayers, which I assume will specifically
409 cover this matter of qualified privilege.

Mr. Cook: That is right.

The Court: Now I won't take time to give my reasons for the ruling I have just made. They are in line with the contention presented in the argument of plaintiff yesterday.

(Whereupon, the prayers were discussed.)

(The jury returned to the Court Room.)

The Court: Members of the Jury, we will now proceed with the arguments.

(Whereupon the case was argued to the jury by the respective counsel.)

Thereupon the Court instructed the jury as follows:

The Court: Members of the Jury: The plaintiff, Edward P. Trainer, here sues the defendant, James H. Blake, for damages on account of an alleged libelous statement made of and concerning the plaintiff to injure him in his business and in his good name, credit, and reputation.

A libel is a printed or written statement maliciously published of and concerning another, which is false and which tends to injure his reputation and thereby expose him to the hatred, contempt, and ridicule of others. Defamatory words imputing to one unfitness to perform the duties of an office or employment of profit or the want of integrity in discharge of the duties of such office or employment are libelous.

Specifically, plaintiff charges that about July 17,
410 1943, the defendant delivered and circulated to members of the plaintiff's union, Local 33, Marine Engineers Beneficial Association, and its affiliated associations

and others, a letter containing statements concerning plaintiff to this effect:

"You are not kidding any one by trying to make the back door agreement that you made with the U. S. Lines Company on the JOHN ERICSSON stick. We will get that case settled some day despite your effort to block it."

Now, it is alleged that these statements meant and were intended to mean what is set forth in the ninth paragraph of the complaint filed by the plaintiff against the defendant.

Therein the plaintiff alleges that the words just quoted meant and conveyed and were intended to mean and convey to the members of plaintiff's union and affiliated associations and to the public that plaintiff was disloyal to the members of his union, that he immorally, unethically, and unlawfully caused an agreement to be made with the United States Lines contrary to the interests and well-being of the members of plaintiff's union and in contravention of his duties as their representative; that is, he immorally, unethically, and unlawfully acted contrary to the interests and well-being of the members of his union and in contravention of his duties as their representative; and that the plaintiff is unworthy of the confidence and respect of
 411 the members of his union, of his profession, and of the public, and that it was intended to cast doubt on other contracts negotiated by plaintiff on behalf of the union and to undermine any confidence in the plaintiff in the discharge of the duties which he was called upon to perform.

That, briefly, states the nature of the plaintiff's claim.

The defendant admits, through his answer filed and by the testimony offered by him, that he did publish the letter of July 17, 1943, containing the statements complained of to plaintiff and to others, but the defendant denies the meaning ascribed to those statements by plaintiff, and he likewise denies that he intended to convey any such meaning. He insists on the contrary that the statements had no sinis-

ter meaning and were published without malice on his part.

So there you have the respective positions of the parties summarized rather briefly by me.

I have granted certain instructions, which counsel for the plaintiff has read to you. I thank him for doing so. It relieved me of the necessity of reading them. You will accept them as correct statements of the law just as though they had been stated by me to you.

Now, as I have outlined the position of the respective parties, you will observe both from that outline as well as from the arguments of counsel that the first real
412 issue of fact which you must determine is this: Do the statements complained of have the meaning which the plaintiff alleges in paragraph 9 of his complaint?

He has ascribed that particular meaning to the words complained of. He asserts that as an essential part of his claim. Hence the burden rests upon the plaintiff to prove the same by a preponderance of the evidence. That I am sure you will recognize is the application of the general rule which requires the plaintiff to establish all the essential elements of his claim by a preponderance of the evidence.

As experienced jurors, you know the definition of that term, "preponderance of evidence." It means the weight of the evidence, the appealing force of the evidence, how it impresses your reason and judgment.

Viewing the evidence pro and con upon a given question, on which side is the balance? Take it as though you had separated all the evidence bearing upon this question which in any wise tended to support the claim of the plaintiff as to the meaning of these words, on the one hand; all the evidence which in any wise tended to refute the evidence of the plaintiff on the other and tended to show a different and an inoffensive meaning to the words used.

Now, in a figurative sense you have that evidence pro and con in the scales. You weigh it in your reason and judgment. They are your scales by which you weigh it.

413. On which side does it weigh most heavily? Where is the balance? Does it weigh more heavily, preponderate in favor of the plaintiff's claim? If so, he has established that assertion by a preponderance of the evidence. If not, he has failed to do so. He thus fails to carry the burden which the law imposes upon him, hence he fails to establish his case. Because he has failed in building an essential support to it, hence his case must fail; and if you should find upon this question that the plaintiff had failed to establish his ascribed meaning to the words complained of, then you need go no farther. You would render a verdict in favor of the defendant.

Needless to say, if they have weighed more heavily in favor of the defendant or if, after fair and impartial weighing of the evidence you can not say that it weighs more heavily one way or the other, it seems equally balanced, in either of those events your verdict, of course, would be for the defendant, for the simple reason that the plaintiff had failed to establish the allegation by a preponderance of the evidence.

Now, upon this vital issue, as you are well aware, the evidence and the argument has revolved principally around the meaning of the expression used in the letter of July 17, "back door agreement," and it behooves you to determine what the meaning of that expression is.

In doing so, you are to judge as to what it meant to those to whom it was addressed. What meaning did it
414 convey to them?

The plaintiff in effect, through his assertion in the complaint and the testimony he has offered in support thereof, contends that in maritime union circles and among members of that union it had a well established meaning and significance, which was an agreement secretly made between an official of a union and an employer repugnant to the interests and advantages of the members of the union and because of some reward which came to the official in so making such an agreement. In short, they contend that

the meaning of that term signified in this instance that Mr. Trainer, the plaintiff, had made a dishonest and corrupt agreement concerning wages and conditions of the employment of the members of his union in betrayal of the trust which had been reposed in him by those members to serve with undivided fidelity the interests and welfare of the members of the union. They say it was a direct attack upon his character as a man, upon his integrity and fidelity as an officer of the union.

Now, you must on the other hand keep in mind the contention of the defendant in support of his claim that the term "back door agreement" had no such meaning nor did he intend to convey any such meaning, and in that regard keep in mind the evidence which he has offered tending to refute the contention of the plaintiff and to show that as he

uses the term, as it was meant to be used, as it would
 415 be read and construed by those to whom it was addressed and others to whose attention it might come, it simply had reference to a hastily made unwritten agreement intended later to be reduced to writing and of which the members of the union affected thereby should be informed and have an opportunity to act upon.

That is, as I recall it, about the position or the contention which the defendant makes with reference to the meaning of that term. I think perhaps in the course of the testimony of some of his witnesses there were other meanings ascribed to it among union men, but I think it is fair to say, in referring to that testimony, that all of it tended—I mean it had a tendency—the weight, of course, is not for me to suggest—it tended to show that the term had no such infamous and scurrilous meaning as had been ascribed to it by the plaintiff.

Now, you must decide that question. You must decide what it did mean. In doing so, you will consider all the surrounding facts and circumstances as you may draw them from the evidence and as they may in any wise reflect light upon the meaning of that term, the meaning which

would be given to it as it was read and considered by those to whom it was addressed and others to whose attention it might come in union circles.

In that connection you may also consider the testimony of the defendant as to his own intention in writing
 416 that. That is not necessarily controlling at all. It may or it may not appeal to you as a circumstance of importance to be considered. It is a matter for you to say, but you have a right to consider it, for the reason that here is a term which has been used and about the meaning as to which there is controversy, and hence, if it be true, and that of course is entirely for you to determine, that Mr. Blake, the defendant, had no feelings of ill-will or anger or vindictiveness against the plaintiff when he wrote the letter of July 17 but that his feelings were friendly and free from animosity and that the letter was written in a spirit of good will, you can see where it may reflect upon the meaning, because it would hardly be assumed that one who was writing in a friendly vein to one against whom he had no feelings would speak ill of him. Only in that way may it be considered as bearing upon the construction to be given the term, and it may be of importance or it may not, according to your own good judgment, as you consider all the other evidence in the case.

A statement, to be libelous, must be false. I do not understand from the position that the parties have taken here that there is any controversy on that point. It is alleged to be false. The statement having the meaning which plaintiff ascribes to it, he alleges it to be false. Defendant doesn't dispute that if it had that meaning it would be true. He
 417 doesn't approach the matter in that way. He says it had no such meaning; he didn't intend to convey such meaning and "therefore, so far as I am concerned, I don't dispute that if it had that meaning it would be false. I am not attacking the integrity of Mr. Trainer."

That, I think, fairly states Mr. Blake's position. If I have not stated it fairly, I certainly wish counsel would correct me.

The matter of malice, of course, is another element, an essential element, in an action for libel. That term has a peculiar meaning in law.

We, as laymen, understand it to mean ill-will, hatred, vengeful feelings towards another, and so it does in lay parlance have that meaning, but in law it has this peculiar meaning: A wrongful act intentionally done to the injury of another without legal justification.

Admittedly here the letter was published, in other words, it was knowingly mailed, delivered to the people referred to in the testimony, and hence there is no question that it was intentionally published, because that is what publication is. It is making known the contents of a paper to another. That is publication in law.

If it is libelous, as I have defined that term to you, which in this case depends upon whether it had the meaning which is ascribed to it by the plaintiff, then it was issued with malice, as that term is used in law.

418 Now, as I have said, you decide the question as to the meaning of the term "back door agreement," of the entire expression, but that is the crux of it. That is the controversial part of it.

If you find that the plaintiff has established that meaning, then, of course, you would resolve that issue in his favor and would go on to a final determination of the case, whereas, if you find in favor of the defendant, you need go no further but will return your verdict for him.

If you should find in favor of the plaintiff, then, what else must you do? You must go on to determine what money award you would make in his favor, what amount of money you would return as a verdict in his favor by reason of the publication of the alleged libelous statements.

If the article is libelous, attacks the honesty, integrity and character of Mr. Trainer as a man and in his business or profession as an official of the union, the law presumes that he suffered damage thereby.

That is true because of the nature of the charge itself, concerning one's character and concerning one's fitness and qualifications for the position or employment which he is carrying on. So it does follow as a matter of law that some injury has been suffered.

The law, too, recognizes the difficulties of one who is a victim of a libel to discover and ascertain the extent
419 of the injury which he may have suffered, to discover this person, that person, and the other person who may have been affected by it and the resulting effects which it may have or which might in the future reflect themselves to the injury of the aggrieved party, and so the law, recognizing those difficulties, takes this position, that one need not affirmatively prove specific injury resultant from a libel of this kind. He may rely upon the presumption indulged in by the law that the natural and probable consequences of the libel will do him injury and leave it to the jury, exercising its best judgment, to say what is the extent of injury in the particular case, expressing it in the form of a money verdict.

And so the plaintiff in this case hasn't attempted to show specific damage but, relying upon this rule of law, submits it to your own good judgment to say what damage he has suffered and to award the money judgment which will fairly reflect what in your reason will compensate him for that damage.

In determining that, you again take into consideration the respective positions of the parties, all the facts and circumstances surrounding the publication of the libel. I won't attempt to enumerate them. Counsel have referred to them, counsel for the plaintiff, and I will pass on by simply saying: Fairly and impartially review all the evidence that might in any wise in your good judgment
420 lead you to a fair and just conclusion about the matter and then to the best of your ability return an amount by way of money award which will reasonably compensate the plaintiff, no more and no less.

That is what we know as compensatory damages, damages to pay for the injury done. In this class of cases, however, the jury has the right to consider the justice of also returning an award for punitive damages, that is, damages by way of punishment to the defendant. In no case are you obliged to do so. It is a matter which the law leaves entirely to your own good judgment, and you should determine without feelings of sympathy or prejudice but purely as a matter of justice whether in this particular case punitive damages should be awarded.

There are certain essential facts which you must find established by a preponderance of the evidence, however, before you would be justified in returning a verdict of punitive damages. You must find that the libel was published with actual malice as distinguished from legal malice.

I have defined that term "legal malice" to you. Actual malice or express malice, so called, means that the libelous statement was published through actual ill-will in a spirit of malevolence, that it was prompted, motivated by an actual desire to injure and do harm to the one to whom it refers.

That might be accomplished either through an affirmative state of mind of that kind or it might occur where one
 421 acts in utter reckless disregard of the rights of another and of the injury that would follow by reason of his act, a wantonly reckless act, the necessary result of which would be to injure the character and reputation of another.

You will consider the evidence fairly and impartially to determine whether or not there was actual malice upon the part of the defendant, Mr. Blake, when he wrote the letter of July 17.

If you believe not, then you disregard the matter of punitive damages, because you would not be justified unless you found actual malice to exist. But if you believe that such malice did exist and prompted the doing of the wrongful act, then you must go one step further and determine

whether or not in this particular case it would be just for you to punish the defendant by assessing these additional damages against him or not. And as to that, you are the sole judges and acting upon the responsibility which I know you feel as jurors will do what in your good, sound judgment is fair and just.

Should you award punitive damages, I direct that you, through your foreman, separate them from the general damage or compensatory damage. In other words, I suggest it would be well for your foreman, in returning your verdict, if you award only compensatory damages, to say

422 "We find in favor of the plaintiff in the sum of so many dollars as compensatory damages. We do not find punitive damages." Or if you find as to both: "We find so much money compensatory damages and so much money punitive damages," so that I may know, for possible further needs in the case, just what is compensatory damages and just what is punitive damages.

Now, finally, Ladies and Gentlemen, and I perhaps have taken too long, but I hope my charge has been helpful to you, I submit the case by reminding you to review the evidence fully and fairly and impartially as it relates to both parties, giving them the full benefit of those things which they have presented in their behalf which may appeal to your reason and judgment and, in doing so, then fairly weigh that evidence pro and con, keeping in mind that the case presents a mental problem, too, one which must be solved in reason and judgment uninfluenced by any feelings of emotion, without any sympathy or prejudice for or against either party in the suit, or anyone who has appeared in any wise connected with it.

Having done that, I am sure that you will reach a just verdict and one which will receive the sanction of your own conscience.

* * * * * * * *

III.

ADDITIONAL PAPERS DESIGNATED424 *Defendant's Requested Instruction No. 1*

CA 20,823

The jury is instructed as a matter of law that if the defendant had an honest belief, and had probable cause to believe, that the plaintiff had entered into a "back door agreement," and if that was a reasonable belief—such a belief as an ordinary prudent and cautious person would fairly entertain upon the facts—then that would be a privileged communication, would not be libelous, and your verdict should be for the defendant.

Refused, J. W. P.

Pinn v. Lawson, 63 App. D. C. 370, 372.

425 *Defendant's Requested Instruction No. 2*

The jury is instructed as a matter of law that the language attributed to defendant amounted to nothing more than a mere criticism of plaintiff's action in connection with securing the contract. There is nothing from which the commission of a crime or moral turpitude can be inferred. The statement to the effect that it was a "back door agreement" must be interpreted in connection with the context as meaning that it was contrary to the rules and regulations of the union. The statement in the letter of July 17, 1943 to the plaintiff, a member of the union, was made in relation to a matter in which all the members were equally interested and under circumstances where wide latitude will be tolerated. So far as appears, the contract may have been procured in accordance with instructions, and may have been satisfactory to every member of the union excepting defendant. Defendant may have been mistaken in his criticism that the contract was contrary to the rules and regulations of the union, but as a member he was

entitled to express his opinion. So long as he acted within the limits of reasonable criticism, though he may have been mistaken, he was within his rights. Plaintiff, by virtue of his membership in the union, and assuming to serve it, was subject to reasonable criticism in respect of the work performed for the union, and the presumption is that the statement was made under these circumstances without malice and for the good of the order, unless the contrary can be inferred reasonably from the language itself.

Caldwell v. Hayden, 42 App. D. C. 166, 169.

Refused, J. W. P.

* * * * *

427 *Defendant's Requested Instruction No. 4*

The jury is instructed as a matter of law that a communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to perform, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter which, without such privilege, would be libelous and actionable.

Refused, J. W. P.

Bailey v. Holland, 7 App. D. C. 184, 190.

428 *Defendant's Requested Instruction No. 5*

The jury is instructed as a matter of law that if you find as a fact that the letter of July 17, 1943, addressed to the plaintiff by the defendant, was sent only to members of the labor organization to which they both belonged by the writer of the letter, the defendant, and those to whom it was addressed had a common interest in the matters to which it related, the letter was therefore qualifiedly privileged.

Refused, J. W. P.

Bereman v. Power Publishing Co. et al., 93 Colo. 581, 27 P. (2nd) 749, 92 A.L.R. 1024, 1026.

429 *Defendant's Requested Instruction No. 6*

The jury is instructed as a matter of law that the writer of the letter and those to whom it was addressed had a common interest in the matters to which it related. The letter, therefore, was qualifiedly privileged. A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains incriminatory matter, which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation.

Refused, J. W. P.

Melcher v. Beller, 48 Colo. 241, 110 P. 181, 184.

* * * * * * * *

431 *Defendant's Requested Instruction No. 8*

The jury is instructed as a matter of law that the letter of July 17, 1943, addressed by the defendant to the plaintiff, was qualifiedly privileged, and unless you find that the plaintiff proved express malice on the part of the defendant by the preponderance of the evidence, your verdict should be for the defendant.

Peterson v. Cleaver (1920) 105 Neb. 438, 181 N. W. 187, 15 A.L.R. 447.

432 *Defendant's Requested Instruction No. 10*

The jury is instructed as a matter of law that the situation was such that legitimate criticism or comment was justifiable. The letter complained of goes no farther. It relates exclusively to plaintiff's dealings in a question of interest only to the union to which the parties belonged. It does not impugn his character or motives, and in this

view, would not subject the plaintiff to public ridicule and contempt.

Withdrawn, J. W. P.

Sullivan v. Meyer, 67 App. D. C. 228.

* * * * *

473 Filed Feb 18 1944

Verdict and Judgment

This cause having come on for hearing on the 15th day of February, 1944, before the Court and a jury of good and lawful persons of this district, to wit:

Courtney W. Geib	Lawrence W. Caddington
Charles S. Heim, Jr.	Lewis B. Cooke
Matthew X. Stone	Sylvia G. Cooper
Pauline M. Clark	Arthur F. Hoyberger
William H. Quick	Arthur W. Jett
Roland M. Brown, Sr.	Thomas T. Kavanagh

who, after having been sworn to well and truly try the issues between Edward P. Trainer, plaintiff and James H. Blake, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 18th day of February, 1944, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendant by reason of the premises is the sum of \$1,500.00 Compensatory plus \$1,000.00 Punitive damages.

Wherefore, it is adjudged that said plaintiff recover of the said defendant the sum of Two thousand and five hundred (\$2,500.00) together with costs.

CHARLES E. STEWART, *Clerk,*

By WM. CASE JR.
Deputy Clerk.

By direction of

Justice JAMES M. PROCTOR

* * * * *

474

Filed Mar 8 1944

Notice of Appeal

Notice is hereby given this 8th day of March, 1944, that the defendant, James H. Blake hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of February, 1944 in favor of the plaintiff, Edward P. Trainer against said defendant, James H. Blake.

P. MICHAEL COOK

Attorney for

Defendant, James H. Blake

JOSEPH P. TUMULTY JR.

1317 F St. N. W.

Memorandum

March 8 1944

Deposit (\$250.00) cash by Cook in lieu of bond on appeal.

* * * * *

486

Filed Apr 11 1944

*Order Extending Time for Filing Record and
Docketing Appeal*

Upon consideration of the motion of the appellant, filed herein on the 11th day of April, 1944, it is by the Court this 11th day of April, 1944,

Ordered that the time within which the record may be filed and the appeal docketed in the United States Court of Appeals for the District of Columbia be and the same is hereby extended to and including the sixth day of June, 1944.

MATTHEW F. McGUIRE

Justice

* * * * *

487

Filed Mar 17 1944

Designation of Record.

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Complaint.
2. Defendant's Answer to Complaint.
3. Defendant's Amendment to Answer.
4. Pre-trial Order.
5. Stenographer's Transcript of Testimony.
6. Plaintiff's Exhibit 7.
7. Defendant's Exhibit "A".
8. Defendant's Requested Instructions Nos. 1-8, inclusive, and No. 10.
9. Verdict of Jury.
10. Judgment.
11. Notice of Appeal.
12. Memorandum of Deposit of \$250.00 to operate in lieu of bond on appeal.
13. This Designation.

L. HAROLD SOTHORON,
Attorney for Appellant.

Service of a copy of the foregoing Designation of Record is acknowledged this 17th day of March, 1944.

JOSEPH P. TUMULTY, JR.,
Attorney for Appellee.

* * * * *

488

Filed Mar 23 1944

Counter-Designation of Record on Appeal.

Plaintiff-appellee hereby designates the following additional portions of the record, proceedings, and evidence to be included in the record on appeal herein:

1. Deposition of Moe Byne, filed January 20, 1944.

2. Plaintiff's Exhibits Nos. 1 to 6, both inclusive, and Nos. 8 to 18, both inclusive.
3. Interrogatories on behalf of Plaintiff, dated October 23, 1943.
4. Replies to said interrogatories, dated November 8, 1943.
5. Plaintiff's Requested Instructions to Jury.
6. Copy of letter dated March 18, 1944, from Joseph P. Tumulty, Jr., attorney for Plaintiff, to P. Michael Cook, attorney for Defendant.
7. Letter dated March 20, 1944, from P. Michael Cook, attorney for Defendant, to Joseph P. Tumulty, Jr., attorney for Plaintiff.
8. Order for Transmission of Plaintiff's Exhibits Nos. 1, 2 and 8 in Original Form.
9. This Counter-designation.

JOSEPH P. TUMULTY, JR.,
Attorney for Plaintiff-Appellee
 1317 F Street, N.W.

Copy of the foregoing Counter-designation of Record on Appeal mailed, postage prepaid, this 23rd day of March, 1944, to L. Harold Sothoron, attorney for Defendant-appellant, 815 Fifteenth Street, N.W.

JOSEPH P. TUMULTY, JR.

* * * * *

IV.

EXHIBITS

437

Plaintiff's Exhibit No. 3.

New York, N. Y., June 29, 1943.

Mr. S. J. Hogan, President,
National M.E.B.A.,
315 Machinists Building,
Washington, 1, D. C.

Dear Sir and Brother:

Several members of M.E.B.A. #33 have protested to me against an advertisement appearing in the lower left hand corner of page 17 of the June issue of the American Marine Engineer, which is an application form for membership in the Diesel Engineers International Assn.

On behalf of M.E.B.A. #33 I wish to file a protest against accepting advertisements and publishing applications for membership in rival organizations to the M.E.B.A., and hope such advertisements will be discontinued.

Fraternally yours,

(Signed) E. P. TRAINER,

Bus. Mgr., M.E.B.A. #33.

438

Plaintiff's Exhibit No. 4.

National Marine Engineers' Beneficial Association
315 Machinists Building
9th Street and Mt. Vernon Place N.W.
Washington, D. C. (1)

July 12, 1943.

Mr. E. P. Trainer, Bus. Mgr.
M. E. B. A. No. 33
227 Fulton Street
New York 7, New York

Dear Sir and Brother:

Reference is made to your letter of June 29, 1943 in which you inform us that several members of M.E.B.A. No. 33 had protested to you against an advertisement appearing in the lower left hand corner of page 17 of the June issue of the American Marine Engineer, which you state "is an application form for membership in the Diesel Engineers International Ass'n."

You also state "on behalf of M.E.B.A. No. 33 I wish to file protest against accepting advertisement and publishing applications for membership in rival organizations to the M.E.B.A., and hope such advertisements will be discontinued." This is to advise you that I have discussed this matter with the Editor of the magazine and he informs me that it is not a labor organization, but that it is purely social and educational.

Brother Blake requests me to have you furnish him the names of the members of M.E.B.A. No. 33 who have objected to that advertisement and he will be glad to write to them and explain. The ad in question is to appear in three issues of the A.M.E. We do not know whether under the postal regulations, if we have a right to cancel the ad.

Therefore, if you will furnish Brother Blake with the

names so he can write to them and try at least to explain to them that piece of advertisement, I will appreciate it.

Fraternally yours,

S. J. HOGAN

President.

sjh/h

CC: Bro. Blake

(Seal—National Marine Engineers' Beneficial Association)

439

Plaintiff's Exhibit No. 5.

New York, N. Y., July 13, 1943

Mr. Samuel J. Hogan, President
National Marine Engineers Ben. Asso.,
315 Machinists Bldg.
Washington, D. C.

Dear Sir and Brother:

I am enclosing a photostatic copy of the signatures of the members of the M.E.B.A. who object to the advertisement and application for membership of the Diesel Engineers International Association in the American Marine Engineer.

Fraternally yours,

/s/ E. P. TRAINER

Encl.

Bus. Mgr. M.E.B.A. #33.

New York, N.Y., July 1st, 1943.

Mr. E. P. Trainer,
Bus. Mgr., I.E.B.A. #33
227 Fulton St.,
New York, N.Y.

Dear Sir and Brother:

I object to the advertisement appearing in the June number of the American Marine Engineer containing an application for Membership in the Diesel Engineers International Assn. because the obligation I took as a member of the I.E.B.A. provided that I ploughed myself not to join another association of marine engineers while I am a member of this order.

This advertisement invites me to break my solemn obligation and I do not think it should appear in our official organ.

Fraternally yours,

Harold C. Bateman
Colin W. Ingersoll
Frank Riley
Leistein Solheim
Wm A. Vogel #5
Johann Schmidt
Joe P. Simpson
Wm J. Brigham
R. H. Finnie
W. J. Gleason
Mike Polianita
P. H. Delanger
L. Tratalas
Albert Gorgias
Andrew Brown

Daniel Sullivan
John Mc Namara
K. Nelson
J. Artemoff
James J. Britton
W. H. Kline
Robert W. Mueller
Amant J. McMichael
J. E. Gormes
A. L. Palmer
P. J. Mulhern

440

BEST COPY AVAILABLE

from the original bound volume

441

Plaintiff's Exhibit No. 6.

National Marine Engineers' Beneficial Association
315 Machinists' Building
9th Street and Mt. Vernon Place N.W.
Washington, D. C. (1)

July 14, 1943

Mr. E. P. Trainer,
Bus. Mgr., M.E.B.A. No. 33,
227 Fulton Street,
New York, 7, N. Y.

Dear Sir and Brother:

This will acknowledge receipt of your letter of July 17, 1943, with the enclosed photostatic copy of the signatures of the members of M.E.B.A. who object to the advertisement and application for membership of Diesel Engineers International Association in the American Marine Engineer.

This is to advise you that I have turned your letter and the photostatic copy of signatures to Brother James H. Blake, "Editor" of the American Marine Engineer for his handling with the members who object to that Ad.

Fraternally yours,

S. J. HOGAN
President

sjh/h

CC: Bro. Blake

442

Plaintiff's Exhibit No. 7.

National Marine Engineers' Beneficial Association
315 Machinists' Building
9th Street and Mt. Vernon Place N.W.
Washington, D. C. (1)

July 17, 1943.

Mr. E. P. Trainer, Bus. Mgr.
M. E. B. A. No. 33
227 Fulton Street
New York 7, New York

Dear Sir and Brother:

Reply is hereby made to your letter of July 13th, addressed to President Hogan, in which you furnished a photostatic copy of signatures of members opposing the advertisement of the Diesel Engineers International Association in the American Marine Engineer. It is obvious that you have led them to believe that we are violating our oath of membership by accepting such advertising.

The misinformation that you have given these worthy brothers makes it imperative for me to answer your letter and to give these members, as well as our subordinate associations, the truth regarding this matter.

In the first place, the National Marine Engineers' Beneficial Association is very definitely a Trade Union, despite the fact that the tactics you are using are doing more to destroy its effectiveness as a trade union than the ship-owners are doing.

It is true that the members of this association are bound by oath "not to join any other organization of marine engineers while a member of the order." This means a member is bound not to join another trade union, but if it means no engineering organization, including those that are organized on a fraternal, social or educational basis, then our membership is full of those who have not lived up to their obligation.

The writer himself is a member of "Power Engineers" to which many of our members belong. It is not a trade union but is in existence only to educate and build up the engineering profession. It is a well recognized national organization and holds national conventions that lead in the engineering field.

I am also a member of the Universal Craftsmen Council of Engineers, an outstanding national organization whose membership is limited to members of the Masonic Order. It is purely social and educational.

I know that the Knights of Columbus have similar engineering organizations. In fact, when I was working at my profession, I met with these boys many times and have found them to be fine, outstanding types of men interested in building up the profession and generally trying to make this world of ours a better place in which to live. Therefore, I have disclosed to you that I am what you can call a first class faker. I belong to other engineering societies other than the National Marine Engineers' Beneficial Association.

Insofar as the Diesel Engineers International Association is concerned, I secured a copy of their by-laws before accepting this advertisement in order to determine whether it was a trade union, and found that it was not. Their objective, as far as is disclosed, is educational in the Diesel Engineering field and its membership is not limited to marine engineers, but is open to any person interested in advancing Diesel Engineering.

You have used this incident to attempt to plant one more of your land mines to disrupt this office and to create as much confusion and misunderstanding as possible.

I take particular notice that you are directing these foul and vicious attacks through President Hogan's office. If President Hogan is content to allow you to continue your attacks on the national office that is his business, but this is due notice to you that when any of these land mines and

bogie traps land in my lap, they are going right back to you where they belong.

You didn't kid anyone when you tried to make the membership believe that I held up approval of the Tanker Amendments when it was simply your own fumbling. You are not kidding anyone by trying to make the back door agreement that you made with the U. S. Lines Company on the John Ericsson stick. We will get that case settled some day despite your efforts to block it. We will also get the Ore Steamship Case settled. While you evidently did a fine job in getting this case this far, you are now making misstatements and endeavoring to cause confusion to handicap the necessary final handling of this case before the National War Labor Board.

You could render a wonderful service to this Association and your fellow men if you would simply get your head down out of the clouds, and realize that we have a war on our hands and that members of this Association are dying on the battlefronts all over the world, and try for the duration, at least to be a man among men.

This is a serious matter for the one man game that you are playing along with other fumbling is having a serious effect on the Association's affairs and the welfare of its members with the result that instead of going to the top and securing the utmost in the line of benefits for its members as well as the marine engineering profession, it is sliding back every day. At present, insofar as national recognition is concerned, it is the unlicensed personnel that is running the ships and keeping them sailing on to victory. Marine engineers are not even mentioned as having a part in keeping the ships Steaming on to "V"ictory.

444 A copy of this letter is being sent to those whom you misled into signing your misstatement of facts as well as to all our subordinate associations in order that all may know the methods you are adopting to undermine and destroy the effectiveness of this national office.

With kindest regards to the membership of M.E.B.A. No. 33, I am

Fraternally yours in Unity and Friendship,

JAMES H. BLAKE

Secretary-Treasurer

JHB:rha

(Seal—National Marine Engineers' Beneficial Association)

445 *Plaintiff's Exhibit No. 9*

Marine Engineers' Beneficial Association No. 33

227 Fulton Street

New York 7, N. Y.

New York, N. Y., July 27, 1943

Mr. James H. Blake, Secretary-Treasurer,
National Marine Engineers Ben. Asso.,
315 Machinists Bldg.,
Washington, 1, D. C.

Dear Sir and Brother:

Receipt is acknowledged of your letter of July 17th.

Let me answer your last statement first.

You say "at present, insofar as national recognition is concerned it is the unlicensed personnel that is running the ships and keeping them sailing on to victory." "Marine Engineers are not even mentioned as having a part in keeping the ships steaming on to 'victory.'"

This statement is both hysterical and untrue. Our records show that 10% of our offshore members have made the supreme sacrifice for their country by giving up their lives. These men are listed as "dead" or "missing as a result of enemy action."

I defy you to show me any unlicensed men's union with such a high percentage of casualties from enemy action as has the M.E.B.A.

You have complained about the number of withdrawals from our organization. But apparently you don't know

that 90% of No. 33's membership to whom withdrawal cards were granted since July 1940 were inducted into the U. S. Naval Reserve.

I defy you to show me any union anywhere that has such a high percentage of the membership holding commissions in the armed forces of the United as has the M.E.B.A.

As to the support of the War Effort by purchasing War Bonds, Local No. 33 has purchased \$40,000.00 worth of War Bonds. For the N.M.U. to equal this amount in proportion to its membership it would have to subscribe for \$1,200,000 worth of Bonds. This it certainly has not done. From all my observations of our membership I believe our membership as individuals have subscribed for more value in bonds per capita than has the membership of any other maritime union.

As for the Diesel Engineers International Association, according to its Secretary-Treasurer, this organization has been in existence scarcely 3 years, but in that short time it has enrolled 4,000 members with branches in the United States, Canada and South America. It publishes its own magazine.

446 It would be impossible for an association to show this growth if it was purely an educational organization for Diesel Engineers. Insofar as I can find from enquiry its entire educational effort is confined to offering to its members books on Diesel Engineering at the same price advertised in the pages of the American Marine Engineer. The D.E.I.A. can do nothing to "educate" the engineers on Motorships that the M.E.B.A. has not already done or is prepared to do. Your statement that the D.E.I.A. is a purely educational organization is absolutely untrue.

Article II of its constitution reads as follows:

"Its basic aim is educational and to establish standards in proficiency for its members, to protect its members and assure for its members the highest in ethics becoming the Diesel Engineering profession, including such conditions appropriate in the standards of living."

That part of Article II which says that one of its aims is to protect its members and assure for its members such conditions appropriate in the standards of living, definitely allows it to bargain collectively for its members under the Wagner Act. The fact that it has not been designated by the N. L. R. B. as yet proves nothing.

That statement alone in its constitution proves conclusively that it is not intended to be solely an educational organization.

But the D. E. I. A. has something besides its constitution which proves beyond doubt that it is not purely educational. It has three Divisions—Stationary, Portable, and Marine; and it has a streamlined employment department which proposes to put Marine Engineers to work on the authority of their license if they become numbers. See Exhibit A attached.

It is also appealing to its Junior members to enroll for training in the U. S. Maritime Service for training, and thus secure a marine license. See Exhibit attached. .

It will naturally control these men after they get marine licenses.

In the past twenty-five years the organizations that fought the M. E. B. A. the most bitterly through dual unionism were the Ocean Association of Marine Engineers (East Coast); The American Society of Marine Engineers (West Coast); The Marine Officers Mutual Association (Gulf Coast) and the United Licensed Officers.

All of these Associations denied they were Trade Unions. All of them at their inception professed to be educational. All of them had an employment department which as time went on was used by various steamship companies to discourage marine engineers from belonging to the M.E.B.A.

In addition the Ocean Association insisted that the difference between the Ocean-going engineer on the one hand and the engineers on the Great Lakes, Rivers and Harbors on the other, was so great that it was necessary to have a separate National Union for Ocean-going engineers, just

as the D.E.I.A. now insists that the difference between steam engineers and Diesel engineers is so great that there must be a separate International Association for Diesel engineers whether marine, stationary or portable.

| Experience has shown that such claims are just an excuse for dual unionism. The steamship owners in the past where they have had any success against the M.E.B.A. always used some type of dual union for their purpose. These dual unions took many names, shapes, and methods of camouflage but all of them strove to control the employment of the marine engineer and thus force him away from the M.E.B.A.

447 We fight the dual union with its employment department by putting a preference of employment clause in our contracts with the owners and by compelling an applicant for membership to swear that "I also bind myself not to join any other organization of marine engineers while I am a member of this order."

| To defend your position in encouraging our membership to join the D. E. I. A. you say "any other organization means any other trade union of marine engineers."

| When the Ocean Association of Marine Engineers was first organized in 1917 quite a number of No. 33's members were expelled for joining the same although these members insisted and proved from quotations from the Ocean's by-laws that the Ocean was not a trade union,

Strange how history repeats itself and how some National Officers will not profit by the lessons that history teaches. Your position that any other organization means a trade union only would allow the president of a company union of marine engineers that defeated the M. E. B. A. in an election to retain his membership in the M. E. B. A. as the Department of Labor holds that a company union is not a trade union. I submit Exhibit C.

| Seeing the serious injury done to our organization on the Great Lakes by the Great Lakes Engineers Brotherhood, a dual union that has proven to be the greatest obstacle to Brother Holmes' effort to organize the Great Lakes, it

amazes me to learn that you want to render useless that part of our oath of obligation which is our greatest bulwark against dual unionism.

In answer to your statement that the M. E. B. A. "is sliding back every day," No. 33's monthly report for July will show that we have received 132 fully paid up applications for membership for the calendar month.

The vessels sailing out of the port of New York under M. E. B. A. contracts made in the port of New York receive the highest wages ever paid to marine engineers in the history of the world.

Admiral Land has insisted that these wages must be reduced to a lower level.

These three facts deny your statement that the M. E. B. A. is sliding back every day.

My answer to your vicious and untrue charge that I made a back door agreement with the U. S. Lines Company on the M. V. John Ericson is to deny your charge and make you the defendant in a libel suit for having made such a statement.

Fraternally yours,

E. P. TRAINER,

Bus. Mgr., M. E. B. A. #33.

448

Exhibit 9A

Filed Mar 23 1944

Diesel Engineers International Association
Comprising the United States and Other Countries
Chartered by the State of New Jersey as a Non-Profit
Membership Association
Executive Offices: 576 Newark Avenue
Jersey City, N. J.

Information Sheet

For Office Files—Required From Applicants

Note: The following questions, please answer brief. We desire information from all applicants, due to variation in

Diesel engineering employment. Just answer those you are most qualified for.

Name of Applicant

1. Are you capable to operate Diesel engines above 1500 hp.

2. Are you experienced in Portable engine operation, such as Shovels, Draglines, Trucks, Locomotives of either Diesel-electric or hydraulic systems.

3. Can you act in the capacity as Management or Maintenance Engineer, where a variety of engines are used.

4. Can you act as an Erecting Engineer.

5. On new plant installation, would you prefer to engage temporary in shop work, familiarizing yourself first with the engine, or engines, you are to operate.

6. If you possess a U. S. Marine Diesel License, would you care to operate marine Diesel engines, or act in any capacity in emergency service.

7. Do you object to foreign service.

8. Would you care to go to the Panama Canal, Base Operating service, or any service under U. S. Government supervision.

9. Are you capable to accept a position as an Inspector.

10. Would you be willing to act in the capacity as Assistant Engineer, until familiarized with your plant.

11. Would you act as a "Transfer" Engineer for temporary duties.

12. Are you capable to undertake machinist repair work.

13. Have you steam experience, ample to entrust you with Exhaust Waste Heat Boilers.

14. Are you experienced in Diesel Pumping service of either Oil or water systems.

15. Do you prefer a small industrial installation.

16. Have you experience in Tractor or Caterpillar operation.

17. Have you College training, or training in military technical institutions.

18. Are you familiar with oil drilling or oil laboratory work.

19. Are you familiar with engines for mine operation.
.....

20. What makes, or types of Diesel engines are you familiar with principally?

21. Are you familiar with electric equipment for power service.

22. Have you laboratory experience for testing service.
.....

23. Are you familiar with Sewage Treatment plants.
.....

24. Are you capable to act as Chief Engineer for municipal Diesel power systems.

25. Have you received technical training, or is your experience from practical services.

Exhibit 9B

449

Attention Junior Members

Never in the history of our country has manpower been of greater need as in our present critical state. The type of men in demand must be possessed of brawn and brains. Unlike war periods of past ages where courage was the only requisite for a man in the armed forces, modern wars require modern trained men. If you are the type of man who can answer this call, the following will interest you:

All young men between the ages of 18 to 23 now have an opportunity to receive training in your chosen occupation in the U. S. Maritime Service, which maintains a circuit of schools for the training of men for ships service.

You receive pay while learning—your full board—all clothing requirement with a neat uniform. After completion of your school period, you receive employment on latest types of Diesel-equipped ships. There are other benefits connected with this wonderful opportunity to serve your country and keep Old Glory flying from the mastheads

of the world's greatest fleet of our new Merchant Marine.

Send for your Application Blank, including Guardian permit, if below the age of 21, and information book—now, directly from the Executive Offices of the Diesel Engineers International Association, 576 Newark Ave., Jersey City, N. J.

Exhibit 9C

"Characteristics of Company Unions—1935"

Bulletin No. 634

450

Chapter XXII

Coexistence of Company Unions and Trade-Unions

Developments between 1933 and the time of the study (1935) made far more common situations in which company unions and trade-unions coexisted in the same plant. The study throws light on the problems that arise when two such forms of organization are present.

In nearly three-fourths of the 125 plants visited, trade-union locals or active trade-union members were reported to be present at the time.¹ In most of these cases the trade-union received no official recognition from the company.² About 30 percent of the companies at the time of the study dealt with one or more trade-unions as well as with the company union.

The form of dealing with the trade-union in such cases ranged from occasional conferences on specific matters to written agreements signed by both parties. Where employers met with trade-union committees, they generally recognized such committees even though some of its members were not employees. A few agreed to meet only with committees of trade-union members composed of their own employees. One very large firm with chain units through-

¹ Unsuccessful attempts to establish trade-unions were reported in other cases. Trade-union members may have worked at other plants, but their presence was not made known to the field agent. For a discussion of methods used by various companies to prevent the establishment of a trade-union and to promote the setting up of a company union instead, see chs. VI, VII, and VIII.

² In at least 12 such cases the trade-union membership included a significant proportion and in a few cases a majority of the employees.

out the country received committees of its unionized workers as representatives of the company's employees and not of the trade-unions. One large corporation with many branches refused to sign a contract with any trade-union, but followed in many plants wage-and-hour provisions which it had agreed upon in negotiations with the trade-union.

The conditions under which dual organization existed varied as regards the priority and extent of the two or more organizations. In 10 plants in which a craft union had functioned for some time before March 1933 a company union was established, following the passage of the N. I. R. A., to prevent the organization of the remaining workers into a trade-union. In other cases trade-unions developed under N. R. A. in plants where company unions had long existed. In still others, both trade-unions and company unions first began to operate after March 1933.

* * * * *

Plaintiff's Exhibit No. 10

451

Filed Mar. 23, 1944

National Marine Engineers Beneficial Assn.

June 17, 1943

Mr. R. Meriwether, Business Manager
M.E.B.A. #97
Room "B", Ferry Bldg.
San Francisco, California

Dear Sir and Brother:

I have your letter of June 15th, 1943, questioning my status as a National Officer of this Association, and as it is sent under the Seal of No. 97, I naturally assume that your attitude has the approval of M.E.B.A. No. 97, and as you have stated the matter of your phone conversation involved the entire Pacific Coast, I am going to answer that letter to the Pacific Coast Association in order that they may know the full score.

In order to remove any possibility of and doubt about me refusing to accept your call (Collect) I did just that and I was not joking about it, it was deliberate on my part, and further if there is any more collect calls coming in here from your office, when Hogan is out of the office they are going to be refused, and even if he does accept them, you are going to be billed for them and we will let the National Convention settle the score.

As to me running the National Office, you are simply all wet, but for all that I am the fellow that was elected National Secretary-Treasurer in January this year, remember me, and I assume that, that the office does carry some responsibility with it, at least there should be some respect shown for that office, but it is apparent that you take it that the entire national office is just a push over, and if a national officer takes any stand of any nature that is not in line with your line of thought or desire then you go on a rampage and threaten to scuttle the entire ship just to satisfy your own personal huff and get even with the guy.

If this was only one instance there might be some excuse, but this has become a habit with you of calling the national office reversing the call, and nine times out of ten it is on matters that could have been much better disposed of by a night or air mail letter. On one instance in particular, last summer when Brother Logan was out of town, you called up here and talked with the girl that was working on the mailing list, then you called Mrs. Gilbert two or three times all on one subject, all calls reversed, and the bill to the National was around \$75.00. Two days later you did ask to talk to me and Mrs. Gilbert let you do it, and I had to go over to the Commerce Building and get your beef settled, that is just what I call a dirty insult and a waste of money, you have did that repeatedly, and from now on as far as I am concerned it is out, I fully realize to oppose you in any way immediately classifies me as a faker and puts grease on the skids, but if this

National Association wants anyone in this office that is to be simply pushed around by every Association official according to their likes and dislikes, well they have the wrong guy, while I am here I am going to give my best efforts to the welfare of this Association and its association and its members and I am not going to cater to any individual just to court his favor, and if you had any sense of fairness at all you would know that your attitude in assuming the right to reverse telephone calls out here every time you felt as if you wanted to talk with Washington was all wet, what would happen if they all did that, and they certainly have as much right to as you do. You say this matter concerned the entire Pacific Coast is that any more reason why the National should pay the bill? The plain facts in this was you knew of this matter Saturday and started to call the office then changed your mind and called Monday in the meantime you could have written a

452 letter which would have made it much easier to handle and besides did you ever hear, that there was a war on, and that long distance phone calls are supposed to be restricted to essentials in order that the lines may be available for essential use, better read up on that before you start hauling people out that are trying to do a good job for you.

There is another matter that I am going to bring to your attention now that I am warmed up, from what I have seen since I have been connected with this Association it appears that very few of you ever did have and respect for this national office, you simply used it more or less as a door mat and expected any help here to play around with you, and I suppose that is another thing that you have against me, you remember asking for the address and phone number of the lady working with me, and when I wouldn't give it to you, you went and asked Sam for it, and while he knew better he gave it to you rather than incur your and went looking for company, and only the fact that Sam

gave you the wrong address stopped you from going and pounding on her door, and, I suppose when I oppose things like that I am running the National Association also, so if you want to even the score put them all in the basket.

It is true that I have taken on things that have not been common with this office, for I did think and still do that there is a urgent need to get more recognition and more respect for this national office, not only from the Association and the membership, but from the public in general, and I have made every effort to bring that about, in addition to what this office used to cover, I have maintained the membership on the National Railway Adjustment Board, and in addition to that have accepted membership on the Marine Panel of the National War Labor Board and the War Manpower Commission for Region 4, in addition I have given Brother Hogan every assistance possible on the extra work that he has had piled on him due to war and other conditions, and, I think we are doing a good job of it, in fact both of us are working well into the night, Saturdays and often Sundays, at least trying to keep things going and get this Association out of the rut it seems to be in as a national institution.

I have made many requests to the association for advice and assistance but as a rule they seem not to care what happens here, although some of them have sent in some very gratifying letters. On this bond sale for building a ship in the name of the M.E.B.A., I think that would go over good with the public and do us a lot of good, and in addition be a worthy contribution to the war effort but you are not interested, you are more interested in making collect calls to the National Office, just to save you the trouble of writing a letter, then if a national officer says anything about it to you, you have to start out to get him.

Well Brother Meriwether, I'm not kidding myself you can get me all right for I've seen too much of these national conventions to expect any fair dealing, but if this is going to be the attitude you are going to take, I just don't know

as if it will be worth while to even try and hold the line here, for we have Trainer on our neck from the other end pulling the same stunts that you are pulling, his idea is to do away with the National Office altogether, so if that is going to be the game with both of you just pushing us around, to suit your own fancy I've just about come to the conclusion that there are a lot of places where I can use my services to a far better advantage than trying to do some good here only to get dumped in the end. It is evident that Trainer is playing with the U. S. Lines to gum up that award on the John Ericsson, well I have had quite a lot to do with that case, which is another thing that the National Secretary didn't bother with, I've taken that up and I think it will be made to stick even if we do have to combat the legal staff of the U. S. Lines, but I felt as if I should call Trainer's hand on it, and I did, so he will be out to get also so if that is going to be the attitude of you fellows, probably you had better have some monkey here that will just set on the side lines and let you push the national office around just as you want to, you certainly don't want me here for I sure as hell will call your hand or anyone elses hand that is simply pushing the National Office around for their own pleasure and satisfaction.

453 I want to tell you again that I assume full responsibility for this operation. Sam was right when he said he didn't know anything about it, he didn't for he was not in the room when the call came in but came in before the connection was made, so don't blame him for that for he has trouble enough trying to keep in step with the tune that you and Trainer set for him. If you enjoy that kind of thing both of you should be very grateful to him for not doing just as I have done in calling your hand long ago. You have made such a good job of this that the War Shipping Administration has evidently got next to it, and know that this National Association is completely divided insofar as any national unity or understanding is concerned, and will make good use of that in arriving at anything like a Uniform Agreement.

Now Brother Meriwether, I have not spent all evening writing this letter just to prolong an argument, it is hot as hell here and the air conditions are on the bum. I could find a lot more enjoyable things to do, but there is a job to be done here a big job, and we could do that job if we would just cut out all this damned monkey business and get together and work together we still could lick the hell out of this WSA and make them like it, and we should do just that, but with the start that we have made on this Uniform Agreement, and the way it is messed up now nothing is going to be accomplished unless we set down and work together on it, and unless we can do that I just don't know what the answer will be, so think this over before you keep on going off half cocked, looking for someone's scalp just because he had the nerve to carry out his obligation as a National Officer. Whatever your decision is you can figure that as long as I am here I am not going to be a phony secretary, it has been hard enough to stay here, and try and work something out of the cobwebs I found here, and all the while simply being kidded about what I was trying to do, and receiving no more respect as a national officer than if I were just the elevator operator, just think this over.

Fraternally yours in Unity and Friendship,

(signed) JAMES H. BLAKE

Secretary-Treasurer

JHB/j

(National Seal)

454

Plaintiff's Exhibit No. 11

Phone Call Between Capt. Devlin and Mr. Merriweather,
as Confirmed by Telegram.

Division of Operations
War Shipping Administration
Telegram
June 17, 1942.

R. E. Meriwether,
Room B—Ferry Building,
San Francisco, California.

Confirming our telephone conversation this date United States Lines in New York City through their Mister McCarthy, Vice-President in charge of operations, will upon request of the National Organization of the Marine Engineers Beneficial Association open negotiations for wage revision on the motorship JOHN ERICSSON type X. United States Lines are the appointed agents of the War Shipping Administration and they alone can enter into collective bargaining agreements with their contracted unions. There has been no agreement for this type ship as she was hurriedly manned and dispatched. Under no circumstances shall this vessel be held up pending negotiations between United States Lines and Marine Engineers Beneficial Association. It is understood that any agreement reached shall be retroactive to the sailing of this vessel on her current voyage.

J. F. DEVLIN,
War Shipping Administration.

cc: Commissioner Macauley
Mr. Sam Hogan, President MEBA,
313-316 Machinists Building
9th Street & Mt. Vernon Place, N.W.

November 13, 1942.

Mr. A. J. McCarthy, Vice President,
United States Lines,
One Broadway,
New York, N. Y.

Dear Sirs:

A copy of your letter dated November 6, 1942, to Mr. S. J. Hogan, President of National Marine Engineers Beneficial Association, regarding the MS John Ericsson has been forwarded to us.

It would appear from your communication that you have overlooked previous correspondence between Capt. J. F. Devlin, the Association, and yourselves, regarding this vessel. Specifically, I refer to the fourth paragraph of your letter in which you state:

"We do not recognize power tonnage as an element in fixing a wage scale and we have been advised by the War Shipping Administration that it does not recognize power tonnage as a basis for an agreement."

We notice in our files a letter to you from Captain Devlin in which he specifically stated that he wished to be corrected in his previous statement to the effect that the War Shipping Administration did not recognize power tonnage as a basis of classification. Our records indicate that you were so advised of this correction.

In paragraph four of your letter of October 22, you state "there is, of course, no reason to have any retroactive feature in the agreement and under no circumstances would we agree to make a wage agreement retroactive to cover a completed voyage."

On June 17, 1942, Captain Devlin notified the National Marine Engineers Beneficial Association that any agreement reached shall be retroactive to the sailing of the John Ericsson.

These negotiations have now extended over what we consider to be an inordinate length of time. We would appreciate it if both parties will either arrive at an immediate understanding or advise us definitely that there is a deadlock.

Copy of this letter goes forward to Mr. S. J. Hogan, President of the National Marine Engineers Beneficial Association.

Very truly yours,

HUBERT WYCKOFF

Director

*Division of Maritime Labor
Relations*

CC—Mr. Hogan.

456

Plaintiff's Exhibit No. 13

National Marine Engineers' Beneficial Association

Nov. 17, 1942

Subject: M V JOHN ERICSSON

Mr. E. P. Trainer

Bus. Mgr. M.E.B.A. #33,

227 Fulton St., New York City.

Mr. R. Meriwether,

Bus. Mgr. M.E.B.A. #97,

Room B, Ferry Bldg., San Francisco, Calif.

Dear Sirs and Brothers:

Enclosed herewith is a copy of a letter received from Mr. A. J. McCarthy, Vice-Pres. of the United States Lines Co., in reply to my letter to him of October 22nd, copy of which I had furnished to each of you. The contents of Mr. McCarthy's letter are self-explanatory.

I call your particular attention to the second paragraph of same, in which he states that, "As you must know, the following wage scale was fixed for the respective ranks on

the JOHN ERICCCSON at the time that vessel sailed from New York in January of this year." In my reply to Mr. McCarthy, you will find that I touched on that question. I do not have in my files copy of any agreement entered into in January covering the JOHN ERICCCSON. I believe my letter to Mr. McCarthy is explanatory in detail. If he refuses to accept my supplement to settle this case, I will then submit it to the Maritime War Emergency Board for a decision, since it will be an evident fact that we are in deadlock on this question.

Also enclosed is a copy of a letter to Mr. McCarthy, from Mr. Wyckoff, Director, Division of Maritime Labor Relations, W.S.A.

With best wishes, I am,

Fraternally yours,

(Signed) S. J. HOGAN,
President.

457

Plaintiff's Exhibit No. 14

Mr. Samuel J. Hogan, President
National M.E.B.A.
315 Machinists Building,
Washington, D. C.

Dear Sir and Brother:

I wish to acknowledge receipt of your letter of November 17 with various inclosures, Subject: M.V. JOHN ERICCCSON.

In reference to the subject matter wish to state positively that I have never at any time made a agreement covering this vessel.

Fraternally yours,

(Signed) E. P. TRAINER

Bus. Mgr. M.E.B.A. #33.

Plaintiff's Exhibit No. 15

458

Filed Mar. 23, 1944.

National Marine Engineers' Beneficial Association
313-316 Machinists' Building
Washington, D. C.
December 16, 1942

Subject: M. V. John Ericsson.

Mr. R. Meriwether. Bus. Mgr. #97,
Room B, Ferry Bldg., San Francisco.
Mr. E. P. Trainer, Bus. Mgr. #33,
227 Fulton St., New York, N. Y.

Dear Sirs and Brothers:

Under date of December 7th. I furnished each of you with a copy of my letter addressed to the Maritime War Emergency Board for the attention of Capt. Macauley, Chairman, in re the JOHN ERICSSON dispute. In this morning's mail I received a joint letter dated December 10th addressed to the writer and Mr. A. J. McCarthy, Vice President of the United States Lines with attached thereto a Statement of Facts in this dispute. Said letter is signed by Mr. H. Wyckoff, Director of the Maritime Labor Relations, W. S. A.

I am submitting to you a copy of letter of December 10th. as well as copy of the Statement of Facts pertaining to this dispute. I have carefully checked up on the contents of the Statement of Facts and I find that it covers the dispute between the U. S. Lines and this Organization in its entirety.

Inasmuch as both of you are interested in this dispute, I am furnishing copy of same to you for your views as to whether or not you deem the statement of facts to be correct before I sign same as approving them.

This is to advise that this procedure is the same procedure that I used in the "CAPE ROMANO" of the Lykes Bros. S. S. Co., and we just recently received a favorable decision from the Board.

I would appreciate very much that you give this matter your immediate attention and advise me your views on same so that I can get action as quickly as possible before the end of the year.

With best wishes, I am.

Fraternally yours,

(signed) S. J. HOGAN,
President.

sjh-b

459

Copy

War Shipping Administration
Washington

December 10, 1942

Mr. S. J. Hogan, President
National Marine Engineers' Beneficial Association
313 Machinists Building,
Washington, D. C.

Mr. A. J. McCarthy, Vice President
United States Lines Company
One Broadway,
New York City.

Gentlemen:

A letter has been received from Mr. S. J. Hogan, President of the National Marine Engineers' Beneficial Association, advising the Maritime War Emergency Board that a deadlock has been reached between the United States Line Company and his Association with respect to the manning and wage scale of the M. V. JOHN ERICSSON.

The dispute arose over this vessel last June and since that time relatively no progress has been made in attempting to arrive at an agreement with respect thereto and supplementing the existing collective bargaining agreement of November 25, 1942 which covers vessels other than the JOHN ERICSSON operated by the Company.

Under the Statement of Policy executed on May 4, 1942 between the War Shipping Administration and the National Marine Engineers' Beneficial Association, the Maritime War Emergency Board is given jurisdiction to dissolve deadlocks in collective bargaining negotiations. Section 2 of said Statement provides:

"It is hereby agreed that the provisions of existing collective bargaining agreements be continued and observed unless changed by mutual agreement between the War Shipping Administration and the unions, or in case of a deadlock by decision of the Maritime War Emergency Board."

In order that this case may be decided with expedition by the Maritime War Emergency Board, we have prepared a proposed agreed statement of the facts in this dispute, which is enclosed for your approval or comments and suggestions. This statement is based on the materials contained in our files and has been prepared with the thought of assisting the Maritime War Emergency Board. Although preferable, it is not obligatory that this dispute be submitted on an agreed statement of facts; consequently, if you desire to present your own version of the facts as well as supporting briefs, such a procedure is entirely satisfactory. In addition, oral argument will be permitted if requested. If you desire to file an additional statement of facts or a brief, it is suggested that such be done promptly so as not to delay a decision in this dispute any
460 further.

In the event the contents of the proposed agreed statement of facts are in accord with your understanding of the circumstances, one copy should be signed and returned to this office.

Yours very truly,

/s/ HUBERT WYCKOFF
Hubert Wyckoff,
Director

Division of Maritime Labor Relations.

Proposed Statement of Facts to be Submitted to the Maritime War Emergency Board in the Dispute Between the United States Lines Company and the National Marine Engineers' Beneficial Association Over the M. V. John Ericcson.

The Motorship JOHN ERICCCSON, formerly the KUNGSHOLM, was purchased from the Swedish-American Line by the United States Maritime Commission and delivered to the United States Lines Company on December 31, 1941 under a special Agency Agreement.

This vessel, the sister ship of the famous GRIPSHOLM, is approximately 608 feet in length and has a gross tonnage in excess of 20,000; it is equipped with two 8-cylinder Burmeiske and Wain Diesel engines having a brake or shaft horsepower of approximately 15,000.

On November 25, 1941 the United States Lines entered into a collective bargaining agreement with the National Marine Engineers' Beneficial Association, which organization on September 18, 1941 had been designated by the National Labor Relations Board as the agent to represent marine engineers for the purpose of collective bargaining with the Company. At the time that this agreement was executed, the Company was not operating any vessels as large as the JOHN ERICCCSON, consequently when this ship was delivered to the United States Lines Company, the existing agreement provided no suitable wage or manning scale adaptable to the vessel. In January, 1942, the JOHN ERICCCSON left New York without a supplement to the existing collective bargaining agreement having been negotiated to cover the vessel; the Company, however, put into effect the following manning and wage scale:

462

	Base Pay	Emergency Increase	Total
Chief Engineer	\$360	\$90.00	\$450.00
Staff Engineer	300	75.00	375.00
Sr. First Ass't Engineer ..	245	61.25	306.25
First Ass't Engineer	235	38.75	293.75
Sr. Second Ass't Engineer	210	52.50	262.50
Second Ass't Engineer ..	195	48.75	243.75
Sr. Third Ass't Engineer.	180	45.00	225.00
Third Ass't Engineer	175	43.75	218.75
Licensed Jr. Engineer	140	35.00	175.00

In June, 1942, the JOHN ERICSSON arrived in San Francisco, and some replacements were required in the vessel's engineering staff. West Coast members of the National Marine Engineers' Beneficial Association objected to signing the ship's articles under the existing wage scale, whereupon, Captain J. F. Devlin, then Marine Superintendent of the War Shipping Administration, sent a wire on June 17, 1942 to Mr. Randolph Meriwether, San Francisco representative of the Association, stating that the vessel had been hurriedly manned and dispatched; that no agreement had been reached regarding the vessel; that he had been assured by Mr. A. J. McCarthy, Vice President of the United States Lines, that the Company would be willing to enter negotiations regarding the vessel, and that any wage scale reached would be retroactive to the sailing of the vessel in its current voyage. Upon the receipt of the letter, the engineers signed the articles and the vessel left for Australia.

Ever since then an attempt has been made by the Company and the Association to reach an agreement with respect to a manning and wage scale. On July 27th. Mr. S. J. Hogan, National President of the engineers association met with Mr. McCarthy of the Company, at which time, on behalf of the U. S. Lines, Mr. McCarthy submitted to Mr. Hogan a proposed agreement containing a manning and wage scale exactly the same as the existing scales. Mr.

Hogan on the other hand, proposed a supplemental agreement containing manning and wage scales similar to those contained in some other agreements between the association and other operators.

This proposed agreement contained the following manning and wage scale for this vessel:

463	Emergency		
	Base Pay	Increase	Total
Chief Engineer	\$440	\$66.00	\$506.00
Staff Chief Engineer	385	57.75	442.75
Sr. First Asst. Engineer ..	305	45.75	350.75
3rd First Asst. Engineer .	295	44.25	339.25
Sr. Second Asst. Engineer	245	36.75	281.75
2 Second Ass't. Engineers.	230	34.50	264.50
Sr. Third Asst. Engineer..	215	32.25	247.50
Two Third Asst. Engineers	210	31.50	241.50
6 Licensed Jr. Engineers.	165	24.75	189.75

Included is a 10 per cent increase over base pay on steam vessels for employment on Diesel engine vessels which is a customary practice under the majority of collective bargaining agreements to which the Association is a party. This practice is not recognized in the existing agreement between the Company and the Association as such agreement covers employment on steam vessels only. Mr. Hogan, on behalf of the Association, rejected the company's proposed agreement of July 27th, containing the existing wage scale, and the Company, on the other hand, did not accept Mr. Hogan's proposed agreement. Consequently, on November 13th., Mr. Hogan offered a supplemental agreement containing the same wage scale as his original proposed agreement, but containing revised manning provisions in that it reduced the First Engineers from 3 to 1; reduced Second Engineers from 2 to 1; and reduced Third Assistant Engineers from 2 to 1.

The Company has subsequently insisted on the Association's accepting the agreement containing the original manning and wage scale which has been in existence since Janu-

ary 1941. The Association has refused to accept this supplemental agreement and contends that the wage scale should be based on an A-3 tonnage classification, (35,000-) which has been recognized in a number of agreements between operators and the Association. The Company has not heretofore recognized power tonnage classification as a basis on which to set up wage scales, believing that the peculiarities of each vessel should be the determining
 464 factor. The Association, generally speaking, desires that engineers employed on the vessels of the same power tonnage, operating in the same trade, receive the same pay.

No progress has been made in resolving this issue and the parties have reached a deadlock, whereupon it is requested that the Maritime War Emergency Board, pursuant to the authority granted to it under Section II of the Statement of Policy, executed on May 4, 1942 between the National Marine Engineers' Beneficial Association and the War Shipping Administration, take jurisdiction of and decide the controversy.

The specific question which the Association and the Company submit to the Maritime War Emergency Board is the following:

What is an equitable wage and manning scale for engineers employed on the M. V. JOHN ERICSSON, operated by the United States Lines Company?

Approved:

NATIONAL MARINE ENGINEERS'
 BENEFICIAL ASSOCIATION

By

Approved:

UNITED STATES LINES COMPANY

By

New York, N. Y., Dec. 17, 1942.

Mr. S. J. Hogan, President,
National M.E.B.A.,
315 Machinists Building,
Washington, D. C.

Dear Sir and Brother:

In answer to your letter re. MOTORSHIP JOHN ERICSSON, you state that you "have carefully checked up the contents of the Statement of Facts and find that it covers the dispute between the U. S. Lines and this Organization in its entirety." You ask me to say whether the Statement of Facts is correct before you sign same.

The Statement of Facts credits you with having submitted an agreement calling for a manning scale for licensed engineers for the Ericsson as follows:

- 1 Chief Engineer
- 1 Staff Chief Engineer
- 1 Senior First Asst. Engineer
- 1 3rd First Assistant Engineer
- 1 Sr. 2nd Assistant Engineer
- 2 Second Assistant Engineers
- 1 Senior 3rd Assistant Engineer
- 2 Third Assistant Engineers
- 6 Licensed Junior Engineers.

This manning scale of yours calls for two assistant engineers less than the present company manning scale in force on the vessel.

This proposed manning scale should be the same as I have given you several times in the past and that you do not seem to approve.

That manning scale is:

- 1 Chief Engineer
- 1 Staff Chief Engineer
- 1 Senior 1st Assistant

- 3 Junior 1st Assistants
- 1 Senior Second Assistant
- 2 Junior 2nd Assistants
- 1 Senior Third Assistant
- 2 Junior 3rd Assistants and 6 licensed junior engineers.

This is the present manning scale of the vessel.

466 As to the company's contention that it has not used the horsepower tonnage scale previously, the Company in receiving its Government operating subsidies recognized the validity of the Power-Tonnage scale of Order No. 15 of the Maritime Commission.

The statement that the "ERICCSON" is a sister ship of the Gripsholm is an error. The GRIPSHOLM has a much smaller horsepower tonnage than the ERICCSON. The shaft horsepower for the GRIPSHOLM is only 13,500 and its gross tonnage is 18,000 which would put the GRIPSHOLM in Class A-2 where the ERICCSON is in Class A-3.

These are my comments on the facts in the matter.

Fraternally yours,

(Signed) E. P. TRAINER,
Bus. Mgr. M.E.B.A. #33.

467 *Plaintiff's Exhibit No. 17*

National Marine Engineers Beneficial Association

Dec. 21, 1942.

Subject: H.V. JOHN ERICCSON.
(United States Lines Co.)

Mr. E. P. Trainer,
Bus. Mgr. M.E.B.A. #33,
227 Fulton St.,
New York City.

Dear Sir and Brother:

Reference is made to your letter of December 17th, in re the MV. JOHN ERICCSON, in answer to my letter on the Statement of Facts in this case.

The contents of your letter have been carefully noted, and caused me to make another check of the manning scale of that vessel, and I find that the manning scale set forth in your letter is absolutely correct, and it is an error on the part of those who drew up this Statement of Facts. However, I wish to thank you for calling this matter to my attention, and I shall try to convince you that I, at no time, disagreed with your manning scale for this vessel. I am enclosing a copy of my letter to Mr. Wyckoff in answer to this Statement of Facts, and you will note that I brought forth the manning scale as you submitted it to me on December 17th, which is the manning scale that has been on that vessel since this dispute arose, and which should not be changed.

You will also note that I brought forth in my letter to Mr. Wyckoff that this ship has two engine rooms, a main propulsion engine room and also, an exceptionally large auxiliary engine room. This information was procured from Bro. Meriwether, in a letter addressed to me on December 18th, in reply to this Statement of Facts.

Thanking you again for calling my attention to this error, I am,

Fraternally yours,

(Signed) S. J. HOGAN,
President.

468

Plaintiff's Exhibit No. 18

National Marine Engineers Beneficial Association

Dec. 21, 1942.

Subject: M.V. JOHN ERICSSON
(U. S. Lines Co.)

Mr. Hubert Wyckoff, Director
Maritime Labor Relations, W.S.A.,
Department of Commerce Building,
Washington, D. C.

Dear Mr. Wyckoff:

We are in receipt of your letter of the 10th, addressed to Mr. A. J. McCarthy, Vice-President of the United States

Lines Co., and to myself, in regard to the dispute with that company covering the M.V. JOHN ERICCCSON, together with Statement of Facts attached thereto.

This is to advise that we have carefully checked up on the Statement of Facts submitted to you, and we have found an error in the manning scale. The manning scale on that ship at the present time, and which should be maintained, is as follows:

- One chief engineer,
- One Staff chief engineer,
- One senior first assistant engineer,
- Three junior first assistant engineers,
- One senior second assistant engineer,
- Two junior second assistant engineers,
- One senior third assistant engineer,
- Two junior third assistant engineers,
- Six licensed junior engineers.

In the second paragraph of this Statement of Facts, we find you mention that the M.V. JOHN ERICCCSON IS A SISTER SHIP of the famous GRIPSHOLM. This is an error. The GRIPSHOLM has a much smaller horsepower tonnage than the ERICCCSON. The shaft horsepower for the GRIPSHOLM is only 13,500, and its gross tonnage is 18,000, which would put the GRIPSHOLM in Class A-2, while the ERICCCSON is in Class A-3.

469 Another matter I would like to bring forth in this Statement of Facts is that the JOHN ERICCCSON is an exceptionally large motor vessel, with two separate engine rooms, one engine room for the propulsion machinery, and an exceptionally large auxiliary engine room. The auxiliary engine room requires as much, if not more, attention than the main propulsion room. From this information, it can be readily seen that the manning scale is the scale which that type of vessel should have for efficient operation.

Outside of the two above mentioned facts, we have found that the Statement of Facts covers the dispute in its en-

tirety, and I am returning one signed copy to you, as requested, with the understanding, however, that the matter set forth in my letter will be brought to the attention of the Board. We would appreciate a decision by the Board before the end of 1942, and I am sure you realize that there are not many more days left until that time. I am,

Very truly yours,

President.

470

Defendant's Exhibit A.

United States Lines Company
One Broadway
New York

Office of the
Vice President

November 6, 1942.

Mr. S. J. Hogan, President,
National Marine Engineers Beneficial Assn.,
313-316 Machinists Building,
Washington, D. C.

MV JOHN ERICCSO

Dear Sir:

Your letter of October 22, 1942, with carbon copies to Mr. Wyckoff, Mr. Devlin, Mr. Trainer and Mr. Merriweather, is acknowledged.

As you must know, the following wage scale was fixed for the respective ranks on the JOHN ERICCSO at the time that vessel sailed from New York in January of this year:

Chief Engineer	\$360.00
Staff "	300.00
Senior First Assistant Engineer.....	245.00
First Assistant Engineers	235.00
Senior Second Asst. Engineer	210.00

Second Assistant Engineers	195.00
Senior Third Assistant Engineer	180.00
Third Assistant Engineers	175.00
Licensed Junior Engineers	140.00

These rates have been paid continuously since that time plus, of course, the temporary increase due to war conditions.

We have had collective bargaining negotiations only with Local 33, and we do not understand what position Mr. Merriweather has in the matter, nor do we understand how he can disapprove something that is submitted and accepted by Mr. Trainer, whom we recognize and deal with in collective bargaining negotiations, and who is Business Agent for Local 33, and who has executed all the agreements.

We do not recognize power tonnage as an element in fixing a wage scale and we have been advised by the War Shipping Administration that it does not recognize power tonnage as a basis for an agreement. There are, of course, varying wage scales for various types of vessels, and we are prepared to sign a supplemental agreement with your organization in accordance with the scale mentioned above.

471 Under such circumstances, there is, of course, no reason to have any retroactive feature in the agreement and under no circumstances would we agree to make a wage agreement retroactive to cover a completed voyage.

If you will send us another agreement similar to the one enclosed in your letter of October 22, 1942, modified as set forth above, we believe that the matter can be promptly closed in accordance with Operation Regulation No. I, Supplement 4, of the War Shipping Administration.

Very truly yours,

A. J. McCARTHY,
Vice President.

AJMcC:D

cc—Mr. A. V. Cherbonnier

“ —Mr. N. T. Lawrence